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Datuk Seri Anwar Ibrahim v Government of Malaysia & Anor

FEDERAL COURT (PUTRAJAYA) — CIVIL REFERENCE NO 06(RS)-1–03 OF 2019(W)

B TENGKU MAIMUN CHIEF JUSTICE, AZAHAR MOHAMED CJ (MALAYA), DAVID WONG CJ (SABAH AND SARAWAK), ZAWAWI SALLEH, ABANG ISKANDAR, IDRUS HARUN, NALLINI PATHMANATHAN FCJJ

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Constitutional Law — Courts — Reference to Federal Court ('FC') — Plaintiff applied to High Court to declare Act of Parliament unconstitutional — Plaintiff's action was purely concerned with constitutionality of the Act itself without relation to any factual dispute or controversy — High Court referred constitutional questions concerning plaintiff's application to FC under s 84 of Courts of Judicature Act 1964 ('CJA') for determination — Whether FC had jurisdiction to hear and determine the questions in a factual vacuum — Whether absence of factual dispute or controversy made referred questions abstract, academic and hypothetical and not answerable by the FC — Whether law that plaintiff sought to strike down was never acted upon by Executive since its inception — Whether even if the legislation was inherently unconstitutional plaintiff had to show how the law adversely affected or threatened to adversely affect his rights or that of any other person — Whether FC mandatorily obliged under s 85(1) of CJA to hear and determine a s 84 reference and had no discretion to refuse to do so

Constitutional Law — Legislature — Infringement of Federal Constitution ('Constitution') — Whether National Security Council Act 2016 ('NSCA') unconstitutional for not having been enacted in accordance with art 149(1) of Constitution — Whether NSCA also unconstitutional for disproportionately removing right of freedom of movement guaranteed under art 9(2) of Constitution — Whether plaintiff as citizen of country and member of public potentially affected by existence of NSCA had locus to challenge its validity without having to show he had been or might be peculiarly affected by it

The appellant filed an originating summons ('OS') in the High Court essentially seeking to declare the National Security Council Act 2016 ('the NSCA') unconstitutional. The OS also sought to declare as unconstitutional and void ss 12, 2 and 8 of, respectively, the Constitutional (Amendment) Acts of 1983, 1984 and 1994 ('the amending provisions'), as well as art 66(4) and (4A) of the Federal Constitution ('FC'). By consensus of the parties, the High Court, pursuant to s 84 of the Courts of Judicature Act 1964 ('the CJA') referred by way of a special case the following constitutional questions to the

Federal Court for its determination: (a) whether the amending provisions were unconstitutional, null and void and of no effect for violating the basic structure of the FC; (b) whether the NSCA was unconstitutional, null and void and of no effect for: (i) having become law pursuant to the amending provisions; (ii) not being enacted in accordance with art 149 of the FC; and (iii) disproportionately violating the right to freedom of movement guaranteed by art 9(2) of the FC. The amending provisions resulted in the present art 66(4) and (4A) of the FC which, read together, deemed a Bill that was presented to the Yang di-Pertuan Agong ('YDPA') for his Royal Assent as having become law if the Bill failed to receive the YDPA's assent within 30 days. The appellant's first main complaint was that since the giving of actual Royal Assent to a Bill was part of the basic structure of the FC, the amending provisions violated that structure by permitting a Bill to automatically become law by virtue of art 66(4) and (4A). Consequently, it was argued, the NSCA, which was the only legislation in Malaysia enacted pursuant to art 66(4A) of the FC, was unconstitutional and void. The appellant's second main complaint was that the NSCA was unconstitutional for not referring in its preamble to art 149 of the FC. It was argued that since the NSCA was a security and anti-subversion law, it should have been enacted in accordance with art 149(1) of the FC and contained a recital of the matters stated in paras (a)–(f) of art 149(1) of the FC. The appellant's third main complaint was that the NSCA was unconstitutional for containing extremely draconian provisions (particularly in ss 18 and 22) that disproportionately violated the right to freedom of movement guaranteed under art 9(2) of the FC. Although the parties to the instant matter had no objection to the Federal Court hearing the constitutional reference, the court itself, out of abundance of caution, decided to satisfy itself that: (1) it had the jurisdiction to determine the reference given that the questions raised were not connected to any factual dispute or controversy; and (2) the appellant had locus standi to raise the constitutional challenges when he, or anyone else, had not been personally affected in any way by the NSCA or the amending provisions.

Held, by majority, declining to answer the constitutional questions posed and remitting the OS back to the High Court:

(1) **(per Tengku Maimun Chief Justice, dissenting and concurring with David Wong CJ (Sabah and Sarawak) except on the question whether the NSCA disproportionately violated the right of freedom of movement under art 9(2) of the Federal Constitution)** The mandatory language of s 85(1) of the CJA did not allow the Federal court to refuse to hear a special case referred to it under s 84. Hence, the proposition that one might read into s 85(1) a discretion of the Federal Court to refuse to hear a reference was not acceptable (see paras 9–10).

(2) **(per Tengku Maimun Chief Justice, dissenting)** The reference in the instant case was not abstract, academic or hypothetical but concerned the live issue of whether Parliament's enactment of the NSCA infringed the

Federal Constitution. The court could not take a 'wait-and-see' approach because a void law remained void. The challenge to the NSCA's validity was not conditioned upon the Executive's action upon the NSCA (see paras 20 & 23).

(3) **(per Tengku Maimun Chief Justice, dissenting)** The appellant had the locus to mount the constitutional challenges without having to show that he was peculiarly affected by the passing of the NSCA. He brought the action as a public-spirited citizen because the NSCA potentially affected him just as it affected any other person in this country. The appellant's action was brought with a view to vindicating the Rule of Law. While a plaintiff seeking a declaration in a private action was required to show some genuine interest in the matter, the same was not true of actions brought in the public interest especially if they concerned the violation of a constitutionally-guaranteed right (see paras 31 & 33–34).

(4) **(per Tengku Maimun Chief Justice, dissenting)** The NSCA should have been enacted in accordance with art 149 of the Federal Constitution because it was, in pith and substance, a national security and anti-subversion law. The fact that it was not so enacted meant that it was in breach of art 149, thus rendering the whole of the NSCA unconstitutional (see paras 36 & 39).

(5) **(per David Wong CJ (Sabah and Sarawak), dissenting)** There was no merit in the argument that this court was not properly placed to answer the constitutional questions posed. This was a fit and proper case for such resolution because the NSCA existed as a law passed by Parliament and deciding its validity notwithstanding that the Executive had not used it was not a resolution of a dispute *in vacuo*. The complaint here was that Parliament had infringed the Federal Constitution in passing the NSCA. Hence, to say that the court was deciding something *in vacuo* was factually incorrect and without merit. The Legislature as well as the Executive were subject to the prohibitions prescribed in the Federal Constitution (see para 90).

(6) **(per David Wong CJ (Sabah and Sarawak), dissenting)** The clear wording of art 128(2) of the Federal Constitution and ss 84–85 of the CJA not only gave this court the jurisdiction and obligation to answer the constitutional questions posed but made it plain that there was no requirement for a concrete dispute or actual controversy affecting the rights and interests of the parties to exist before the Federal Court could exercise its referral jurisdiction. And when a valid special case was referred to it by the High Court under s 84 of the CJA, the Federal Court was mandatorily required by s 85(1) to hear and determine the same. The Federal Court did not have the discretion to decline to hear such a case (see paras 57, 69–71 & 220).

(7) **(per David Wong CJ (Sabah and Sarawak), dissenting)** Neither the amending provisions nor art 66(4) and (4A) of the Federal Constitution had removed the Royal Assent from the legislative process. Hence, the argument that the amending provisions had violated the 'basic structure' of the Federal Constitution was misplaced (see paras 139, 141–142 & 145).

(8) **(per David Wong CJ (Sabah and Sarawak), dissenting)** The provisions of the NSCA showed that it was a law against subversion envisaged by Part XI of the Federal Constitution, specifically art 149(1) thereof. It therefore should have been passed under that Article. And since it was not stated that it was enacted pursuant to art 149(1) in the preamble, the NSCA was unconstitutional (see para 178).

(9) **(per David Wong CJ (Sabah and Sarawak), dissenting)** Article 9(2) of the Federal Constitution permitted Parliament the latitude to restrict freedom of movement on any of the grounds mentioned therein, but Parliament nonetheless had to ensure that such restrictions were proportionate to a legitimate legislative aim and that the interests of the State vis a vis the interests of the public was adequately balanced. In that regard, the NSCA as a whole, and ss 18 and 22 of it in particular, was a disproportionate intrusion on the right to freedom of movement guaranteed by art 9(2) of the Federal Constitution and was thereby unconstitutional (see paras 195, 217 & 219).

(10) **(per Nallini Pathmanathan FCJ, majority)** In the absence of an actual controversy affecting the rights of the parties, the constitutional questions referred to the court were abstract and purely academic. The questions had not become academic due to some change in the factual substratum; they were academic for there being no real dispute underlying the questions to begin with. They existed in a complete factual vacuum before the court. Although the constitutional questions posed were undoubtedly of importance, this was not a proper case for the Federal Court to answer the questions in the abstract. In the circumstances, the court was constrained to go no further than to express its grave reservations as to the constitutional validity of the NSCA (see paras 287–288).

(11) **(per Nallini Pathmanathan FCJ, majority)** In the originating summons and affidavit in support thereof, the only facts stated by the appellant were that he was imprisoned at the time of the action and that he brought the action as a citizen of Malaysia. The remaining contents of the affidavit were purely legal in nature, relating to the amendment to art 66(4) of the Federal Constitution ('the Constitution'), the enactment of the NSCA and the alleged inconsistency with the provisions and basic structure of the Constitution. The appellant did not assert that his rights had been affected by the amending provisions or by the NSCA. No

mention was made as to what rights, if any, of the appellant or of any other person was affected or was threatened to be affected by the amending provisions or the NSCA. His grievance was purely legal, directed against the alleged inherent unconstitutionality of the NSCA and based on no other fact than the very existence of that Act itself (see paras 267 & 285).

(12) **(per Nallini Pathmanathan FCJ, majority)** While the court recognised that, in principle, the very existence of an allegedly unconstitutional law might in some cases give rise to an actual controversy affecting the rights of parties, it had not been satisfactorily demonstrated that the present case fell within that exceptional category. It was not alleged, for instance, that the NSCA was a law specifically targeted at a particular group of which the appellant was a part or that the appellant faced a real and credible threat of action under the NSCA which would be detrimental to his rights. It had not been shown that the very existence of the NSCA interfered with the conduct of the appellant's personal life or the personal life of any other person. The mere assertion that the statute existed and that the appellant was a citizen of the country, without more, was insufficient to give rise to an actual controversy (see para 286).

(13) **(per Nallini Pathmanathan FCJ, majority)** In the common law model of decentralised, concrete review adopted in Malaysia, the constitutional review of legislation, as a general rule, could not be triggered in the absence of a concrete, real and actual controversy affecting the rights and interests of parties. To answer the questions posed to the court would be a significant departure from the deep-rooted and trite rule that the court would not entertain abstract or academic questions; it would be a fundamental shift away from the common law model of concrete review (of the constitutionality of a law in the context of a factual dispute before the court) towards the European model of abstract review (of the constitutionality of a law without reference to any factual context). Exceptionally cogent reasons had to be provided to persuade the Federal Court to undertake such a radical departure from established principle. In this case, the parties had not attempted to do so (see paras 187, 230, 232, 234 & 283).

(14) **(per Nallini Pathmanathan FCJ, majority)** In dealing with a reference under s 84 of the CJA, the Federal Court was not bound to answer the constitutional question posed in the terms framed but retained a wide range of powers to deal with it in the same way as it would deal with an appeal (see s 85(1) of the CJA). In dealing with a civil appeal, the Federal Court's powers included the power to amend or add questions of law for which leave to appeal was granted or to decline to answer a question of law if it related to an issue not pleaded or which had been abandoned before the High Court or if an answer was unnecessary or served no

purpose of if the question was abstract, academic or hypothetical. The suggestion that the Federal Court had no choice but to answer any constitutional question referred to it in every case under s 84 was misguided and founded on a misunderstanding of the role and powers of the Federal Court (see paras 252–255).

[Bahasa Malaysia summary

Perayu telah memfailkan saman pemula ('SP') di Mahkamah Tinggi terutamanya memohon untuk mengisytiharkan Akta Majlis Keselamatan Negara 2016 ('AMKN') adalah tidak berperlembagaan. SP itu juga memohon untuk mengisytiharkan tidak berperlembagaan dan tidak sah, masing-masingnya, ss 12, 2 dan 8 Akta Perlembagaan (Pindaan 1983, 1984 dan 1994 ('peruntukan yang dipinda'), dan juga perkara 66(4) dan (4A) Perlembagaan Persekutuan ('PP'). Melalui muafakat pihak-pihak, Mahkamah Tinggi, menurut s 84 Akta Mahkamah Kehakiman 1964 ('AMK') merujuk melalui kes istimewa persoalan berikut kepada Mahkamah Persekutuan untuk ditentukannya: (a) sama ada peruntukan yang dipinda adalah tidak berperlembagaan, terbatal dan tidak sah dan tidak memberi kesan melanggar struktur asas PP; (b) sama ada AMKN adalah tidak berperlembagaan, terbatal dan tidak sah dan tiada kesan kerana: (i) menjadi undang-undang menurut peruntukan yang dipinda; (ii) tidak digubal menurut perkara 149 PP; dan (iii) secara tidak seimbang melanggar hak untuk kebebasan bergerak yang dijamin oleh perkara 9(2) PP. Peruntukan yang dipinda menghasilkan perkara 66(4) dan (4A) PP yang mana, dibaca bersama, dianggap sebagai Rang Undang-Undang yang dikemukakan kepada Yang di-Pertuan Agong ('YDPA') untuk Persetujuan Dirajanya sebagai menjadi undang-undang jika Rang Undang-Undang itu gagal menerima perkenan YDPA dalam tempoh 30 hari. Aduan utama pertama perayu adalah memandangkan pemberian Persetujuan Diraja sebenar untuk Rang Undang-Undang adalah sebahagian daripada struktur asas PP, peruntukan yang dipinda telah melanggar struktur tersebut dengan membenarkan Rang Undang-Undang secara automatik menjadi undang-undang menurut perkara 66(4) dan (4A). Berikutan itu, ia dihujahkan, AMKN, yang merupakan satu-satunya perundangan di Malaysia yang digubal menurut perkara 66(4A) PP, adalah tidak berperlembagaan dan tidak sah. Aduan utama kedua perayu adalah bahawa AMKN tidak berperlembagaan kerana tidak merujuk dalam tajuknya kepada perkara 149 PP. Ia dihujahkan bahawa oleh kerana AMKN merupakan undang-undang keselamatan dan anti-subversi, ia patut digubal menurut perkara 149(1) PP dan mengandungi bacaan kepada perkara-perkara yang dinyatakan dalam perenggan (a)–(f) kepada perkara 149(1) PP. Aduan utama ketiga perayu adalah bahawa AMKN tidak berperlembagaan kerana mengandungi peruntukan drakonion (khususnya dalam ss 18 dan 22) yang melanggar secara tidak seimbang hak kebebasan bergerak yang dijamin di bawah perkara 9(2) PP. Walaupun pihak-pihak kepada perkara ini tiada bantahan kepada Mahkamah Persekutuan yang mendengar rujukan perlembagaan itu,

mahkamah dengan sendirinya, kerana berhati-hati, telah memutuskan untuk memuaskan dirinya bahawa: (1) ia mempunyai bidang kuasa untuk menentukan rujukan memandangkan bahawa persoala yang ditimbulkan tiada kaitan dengan apa-apa pertikaian atau kontroversi; dan (2) perayu mempunyai locus standi untuk menimbulkan cabaran perlembagaan apabila dia, atau orang lain, yang tidak secara peribadi terjejas dalam apa cara oleh AMKN atau peruntukan yang dipinda.

Diputuskan, melalui majoriti, menolak untuk menjawab persoalan perlembagaan yang dikemukakan dan meremitkan AP balik kepada Mahkamah Tinggi:

(1) **(oleh Tengku Maimun Ketua Hakim Negara, menentang dan bersetuju dengan David Wong HB (Sabah dan Sarawak) kecuali berhubung persoalan adakah AMKN secara tidak proporsional melanggar hak kebebasan bergerak di bawah perkara 9(2) PP)** Bahasa mandatori s 85(1) AMK tidak membenarkan Mahkamah Persekutuan menolak untuk mendengar kes istimewa yang dirujuk di bawah s 84. Oleh itu, cadangan yang seseorang mungkin membaca s 85(1) suatu budi bicara Mahkamah Persekutuan untuk enggan mendengar suatu rujukan tidak boleh diterima (lihat perenggan 9–10).

(2) **(oleh Tengku Maimun Ketua Hakim Negara, menentang)** Rujukan dalam kes ini tidak abstrak, akademik atau hipotetikal tetapi berkaitan isu secara langsung mengenai sama ada penggubalan Parlimen untuk AMKN melanggar Perlembagaan Persekutuan. Mahkamah tidak dapat mengambil pendekatan 'tunggu-dan-lihat' kerana undang-undang yang tidak sah tetap tidak sah. Cabaran untuk kesahan AMKN tidak bergantung pada tindakan Eksekutif ke atas AMKN (lihat perenggan 20 & 23).

(3) **(oleh Tengku Maimun Ketua Hakim Negara, menentang)** Perayu mempunyai locus untuk memulakan caaran perlembagaan tanpa perlu menunjukkan bahwa dia khususnya terjejas dengan kelulusan AMKN. Dia memulakan tindakan itu sebagai rakyat berjiwa masyarakat kerana AMKN berpotensi menjejaskannya sama seperti orang lain di negara ini. Tindakan perayu dimulakan dengan tujuan untuk mewajarkan Kedaulatan Undang-Undang. Walaupun seorang plaintif memohon deklarasi dalam tindakan persendirian dikehendaki untuk menunjukkan kepentingan yang tulen dalam perkara ini, hal yang sama tidak berlaku terhadap tindakan yang dimulakan demi kepentingan awam terutama jika ia berkenaan dengan pelanggaran hak yang dijamin oleh perlembagaan (lihat perenggan 31 & 33–34).

(4) **(oleh Tengku Maimun Ketua Hakim Negara, menentang)** AMKN sepatutnya digubal menurut perkara 149 Perlembagaan Persekutuan kerana ianya adalah, pada asasnya, undang-undang anti-subversif dan

berkaitan keselamatan negara. Fakta bahawa undang-undang itu tidak digubal sedemikian bermaksud ia telah melanggar perkara 149, oleh itu menjadikan keseluruhan AMKN tidak berperlembagaan (lihat perenggan 36 & 39). A

(5) **(oleh David Wong HB (Sabah dan Sarawak), menentang)** Tiada merit dalam hujah bahawa mahkamah ini bukan dalam kedudukan sewajarnya untuk menjawab persoalan perlembagaan yang ditimbulkan. Ini adalah kes yang tepat dan wajar untuk resolusi tersebut kerana AMKN wujud sebagai undang-undang yang diluluskan oleh Parlimen dan memutuskan kesahihannya walaupun Eksekutif tidak menggunakannya, itu bukan penyelesaian pertikaian *in vacuo*. Aduan di sini adalah bahawa Parlimen telah melanggar Perlembagaan Persekutuan dalam meluluskan AMKN. Justeru, untuk mengatakan bahawa mahkamah memutuskan sesuatu *in vacuo* sebenarnya tidak betul dan tanpa merit. Badan Perundangan dan juga Eksekutif tertakluk kepada larangan yang ditetapkan dalam Perlembagaan Persekutuan (lihat perenggan 90). B C D

(6) **(oleh David Wong HB (Sabah dan Sarawak), menentang)** Penyataan yang jelas dalam perkara 128(2) Perlembagaan Persekutuan dan ss 84 dan 85 AMK bukan sahaja memberi mahkamah ini bidang kuasa dan tanggungjawab untuk menjawab persoalan perlembagaan yang ditimbulkan tetapi menyatakan dengan jelas bahawa tidada keperluan untuk pertikaian konkrit atau kontroversi sebenar yang menjejaskan hak dan kepentingan pihak-pihak yang wujud sebelum Mahkamah Persekutuan dapat menjalankan bidang kuasa rujukannya. Dan apabila kes istimewa yang sah disrujuk kepadanya oleh Mahkamah Tinggi di bawah s 84 AMK, Mahkamah Persekutuan diwajibkan oleh s 85(1) untuk mendengar dan menentukan hal yang sama. Mahkamah Persekutuan tidak mempunyai budi bicara untuk menolak untuk mendengar kes seperti itu (lihat perenggan 57, 69–71 & 220). E F G

(7) **(oleh David Wong HB (Sabah dan Sarawak), menentang)** Peruntukan yang dipinda mahupun perkara 66(4) dan (4A) Perlembagaan Persekutuan tidak mengeluarkan Persetujuan Diraja daripada proses perundangan. Oleh itu, hujah bahawa peruntukan yang dipinda telah melanggar 'struktur asas' Perlembagaan Persekutuan tidak kena pada tempatnya (lihat perenggan 139, 141–142 & 145). H

(8) **(oleh David Wong HB (Sabah dan Sarawak), menentang)** Peruntukan AMKN menunjukkan bahawa ia adalah undang-undang menentang perbuatan subversif yang dibayangkan oleh Bahagian XI Perlembagaan Persekutuan, khususnya perkara 149(1). Oleh itu, hal itu patut diluluskan berdasarkan perkara tersebut. Dan oleh kerana tidak dinyatakan bahawa ia digubal menurut perkara 149(1) pada I

mukadimah, AMKN adalah tidak berperlembagaan (lihat perenggan 178).

(9) **(oleh David Wong HB (Sabah dan Sarawak), menentang)** Perkara 9(2) Perlembagaan Persekutuan membenarkan Parlimen untuk mengehadkan kebebasan bergerak atas apa-apa alasan yang disebutkan di dalamnya, namun Parlimen harus memastikan bahawa larangan itu adalah seimbang dengan tujuan perundangan yang sah dan kepentingan negara serta kepentingan orang ramai sama seimbang. Sehubungan itu, AMKN secara keseluruhan, dan khususnya perkara-perkara 18 dan 22 khususnya, adalah penyimpangan tidak seimbang terhadap hak kebebasan bergerak yang dijamin oleh perkara 9(2) Perlembagaan Persekutuan dan dengan itu tidak berperlembagaan (lihat perenggan 195 & 217–219).

(10) **(oleh Nallini Pathmanathan HMP, majoriti)** Tanpa kontroversi sebenar yang menjejaskan hak pihak-pihak, persoalan perlembagaan yang dirujuk kepada mahkamah adalah abstrak dan akademik semata-mata. Persoalan terebut tidak menjadi akademik akibat beberapa perubahan dalam substratum faktual; ianya akademik kerana tiada pertikaian sebenar dalam persoalan tersebut itu sendiri. Ia wujud dalam kekosongan faktual lengkap di hadapan mahkamah. Walaupun persoalan perlembagaan yang dikemukakan tanpa diragui adalah penting, ia bukan kes wajar untuk Mahkamah Persekutuan menjawab persoalan itu secara abstrak. Dalam keadaan itu, mahkamah dikekang untuk melangkah lebih jauh daripada menyatakan keraguannya mengenai kesahan perlembagaan AMKN (lihat perenggan 287–288).

(11) **(oleh Nallini Pathmanathan HMP, majoriti)** Dalam saman pemula dan afidavit sokongan, fakta yang hanya dinyatakan oleh perayu adalah bahawa dia dipenjarakan pada masa tindakan itu dan bahawa dia telah memulakan tindakan itu sebagai warganegara Malaysia. Kandungan lain afidavit bersifat undang-undang semata-mata, berkaitan dengan pindaan kepada perkara 66(4) Perlembagaan Persekutuan ('Perlembagaan'), enakmen AMKN dan tidak konsisten dengan peruntukan dan strutur asas Perlembagaan perayu tidak menegaskan bahawa haknya telah terjejas oleh perutukan yang dipinda atau oleh AMKN. Tidak disebutkan hak mana, jika ada, perayu atau mana-mana orang lain yang terjejas atau diancamakan terjejas oleh peruntukan yang dipinda atau AMKN. Kilanannya benar-benar sah, ditujukan terhadap ketidakperlembagaan sedia ada AMKN yang dikatakan itu dan tidak berdasarkan apa-apa fakta lain selain akta itu sendiri (lihat perenggan 267 & 285).

(12) **(oleh Nallini Pathmanathan HMP, majoriti)** Walaupun mahkamah mengiktiraf bahawa, pada dasarnya, kewujudan undang-undang yang dikatakan tidak berperlembagaan dalam beberapa kes menimbulkan kontroversi sebenar menjejaskan hak pihak, ia tidak secara memuaskan

menunjukkan bahawa kes ini jatuh dalam kategori yang luar biasa. Ia tidak dikatakan, misalnya, bahawa AMKN adalah undang-undang yang secara spesifik ditujukan kepada kumpulan tertentu yang mana perayu adalah sebahagiannya atau bahawa perayu menghadapi ancaman tindakan yang nyata dan dapat dipercayai di bawah AMKN yang akan merugikan haknya. Tidak ditunjukkan bahawa kewujudan AMKN mengganggu tingkah laku kehidupan peribadi perayu atau kehidupan peribadi orang lain. Ketegasan semata-mata bahawa statut itu wujud dan bahawa perayu adalah warganegara negara ini, tanpa lebih banyak lagi, tidak cukup untuk menimbulkan kontroversi yang sebenarnya (lihat perenggan 386).

(13) **(oleh Nallini Pathmanathan HMP, majoriti)** Dalam model undang-undang biasa mengenai desentralisasi, ulasan konkrit yang diterima pakai di Malaysia, kajian semula perlembagaan perundangan, sebagai rukun am, tidak boleh tercetus jika tiada kontroversi yang konkrit, nyata dan sebenar yang menjejaskan hak dan kepentingan pihak. Untuk menjawab soalan-soalan yang diajukan kepada mahkamah merupakan penyimpangan yang signifikan daripada peraturan yang mendalam dan lapuk bahawa mahkamah tidak akan melayan soalan-soalan abstrak atau akademik; ini akan peralihan asas daripada model undang-undang biasa kajian semula konkrit (mengenai keperlembagaan undang-undang dalam konteks pertikaian faktual di hadapan mahkamah) ke arah kajian semula abstrak model Eropah (mengenai keperlembagaan undang-undang tanpa merujuk kepada apa-apa konteks faktual). Alasan-alasan yang sangat meyakinkan harus disediakan untuk meyakinkan Mahkamah Persekutuan untuk melakukan peralihan radikal dari prinsip yang telah ditetapkan. Dalam hal ini, pihak-pihak tidak berusaha untuk melakukannya (lihat perenggan 252–255).

(14) **(oleh Nallini Pathmanathan HMP, majoriti)** Dalam menangani rujukan di bawah s 84 AMK, Mahkamah Persekutuan tidak terikat untuk menjawab persoalan perlembagaan yang diajukan dalam terma yang dibuat tetapi mengekalkan kuasa yang luas untuk menghadapinya dengan cara yang sama seperti yang akan ditangani untuk rayuan (lihat s 85(1) AMK). Dalam menangani rayuan sivil, kuasa Mahkamah Persekutuan termasuk kuasa untuk meminda atau menambah persoalan undang-undang yang mana kebenaran untuk merayu diberikan atau ditolak untuk menjawab persoalan undang-undang jika ia berkaitan dengan isu yang tidak dipli atau yang telah ditinggalkan di hadapan Mahkamah Tinggi atau jika jawapan tidak perlu atau tiada tujuan menjawab jika persoalan itu abstrak, akademik atau hipotesis. Saranan bahawa Mahkamah Persekutuan tidak mempunyai pilihan selain untuk menjawab setiap persoalan perlembagaan yang dirujuk kepadanya dalam setiap kes di bawah s 84 adalah mengelirukan dan berdasarkan salah

faham mengenai peranan dan kuasa Mahkamah Persekutuan (lihat perenggan 195 & 217–219).]

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Dangerous Drugs Act 1952 s 37A
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Indian Constitution [IND] art 368
Internal Security Act 1960 (repealed by Security Offences (Special Measures) Act 2012) ss 47, 51
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Sedition Act 1948
Rules of Court 2012 O 1 r 4, O 5 r 1, O 15 r 16
Rules of the Federal Court 1995 rr 32, 33, 34, 35, 36, 37
Security Offences (Special Measures) Act 2012

Appeal from: Originating Summons No WA-24–97–08 of 2016 (High Court, Kuala Lumpur)

Gopal Sri Ram (Leela Jesuthasan, Emily Wong, How Li Nee and Raveena Kaur with him) (Chambers of Leela J) for the appellant.
Alice Loke Yee Ching (Suzana Atan and Narkunavathy Sundareson with her) (Senior Federal Counsel, Attorney General's Chambers) for the respondent.

Tengku Maimun Chief Justice (delivering dissenting judgment):

INTRODUCTION

[1] The matter before us concerns the National Security Council Act 2016 ('the NSC Act 2016') which came into force on 1 August 2016.

[2] Pursuant to s 84 of the Courts of Judicature Act 1964 ('the CJA 1964'), the High Court referred to this court, by way of a case stated, the following constitutional questions for determination:

(1) whether the following provisions of written law are unconstitutional, null and void and of no effect:

(i) s 12 of the Constitution (Amendment) Act 1983 (Act A566);

(ii) s 2 of the Constitution (Amendment) Act 1984 (Act A584); and

(iii) s 8 of the Constitution (Amendment) Act 1994 (Act A885)

on the ground that they violate the basic structure of the Federal Constitution;

(2) whether the NSC Act 2016 is unconstitutional, null and void and of no effect on the following grounds:

(i) it became law pursuant to unconstitutional amendments;

(ii) it was not enacted in accordance with art 149 of the Federal Constitution; and

(iii) it violates the freedom of movement guaranteed by art 9(2) of the Federal Constitution.

[3] I have read the judgment of the majority in draft and it is with great regret that I depart from the views of the majority.

[4] Accordingly, this is my judgment indicating the extent of my agreement with the dissenting judgment of the learned Chief Judge of Sabah and Sarawak ('CJSS') and to provide my own reasons in respect of the issues that arise in this reference.

THE REFERENCE JURISDICTION OF THE FEDERAL COURT/SS 84 AND 85 OF THE CJA 1964

[5] In hearing this matter, we essentially had two concerns, firstly whether the requirements of s 84 of the CJA 1964 as decided in *Wee Choo Keong v Lee Chong Meng & Anor* [1996] 3 MLJ 41 and *Mat Shuhaimi bin Shafei v Kerajaan Malaysia* [2015] MLJU 633 have been met and secondly whether we should

answer the questions referred to, which are purportedly *in vacuo*, given that there was purportedly no factual matrix or real dispute between the appellant and the respondents in this case.

[6] I have read and carefully considered the judgment of the Court of Appeal in *Wee Choo Keong* which was followed by the High Court in *Mat Shuhaimi*. In *Wee Choo Keong*, Siti Norma Yaacob JCA (as she then was) decided that 'there must be a difficult issue or issues posed by the dispute that are irreconcilable with a constitutional provision and it is only in that situation that reference of a constitutional question becomes necessary'. The other learned judges in the panel, namely, Abdul Malek Ahmad JCA and Abu Mansor JCA made observations with similar effect.

[7] In *Mat Shuhaimi*, the learned High Court judge, influenced by the decision in *Wee Choo Keong*, went on to hold that there must be some form of 'pending proceedings' at the High Court before a reference may be made to the Federal Court. The ratio decidendi of *Mat Shuhaimi* suggests that the constitutional questions must be severable from the proceedings from which such questions arose. In that case, the severability was apparent in that there was the issue on the constitutional validity of a penal provision on the one side; and the trial of the accused on that penal provision, on the other side.

[8] I am hesitant to conclude that the two decisions in *Wee Choo Keong* and *Mat Shuhaimi* were correctly decided because the principles they purport to establish are not supported by the clear language of ss 84 and 85 of the CJA which is comparatively broader.

[9] It is a settled general principle of law that the courts must construe legislation in accordance with their ordinary words and meaning in line with the intention of Parliament. As a corollary, the judicial role does not permit judges to import external words and meaning into legislation against what Parliament had intended. In this regard, s 85(1) of the CJA 1964 clearly stipulates that once a special case is transmitted to the Federal Court pursuant to s 84 of the CJA 1964, the Federal Court 'shall ... deal with the case and hear and determine it in the same way as an appeal to the Federal Court'. Therefore, the mandatory language of s 85(1) does not allow the Federal Court to refuse to hear a special case referred to it by the High Court.

[10] With respect, I therefore do not agree with the proposition that one may read into s 85(1) of the CJA the discretion of the Federal Court to refuse to hear a reference. This is because such a reading is contrary to the clear mandatory language of that section. Article 128(2) of the Federal Constitution clearly provides that the Federal Court possesses a 'reference jurisdiction' subject to the 'rules of court regulating that jurisdiction'. The relevant rules of the Rules of

the Federal Court 1995 are rr 32–37. Rule 36 of the Rules of the Federal Court 1995, in particular clarifies s 85(1) on how the special case is to be dealt with as an appeal. Rule 36 reads:

> 36(1) Where a special case has been filed it shall subject to the provisions of these Rules be dealt with and regarded in all ways as an appeal to the Federal Court.
>
> (2) The special case shall be treated as the record of appeal.
>
> (3) The plaintiff in the proceedings in the High Court shall be treated as the appellant and all other parties as the respondent.
>
> (4) All steps required to be taken under Chapter III of these Rules prior to the filing of record of appeal shall be deemed to have been taken.
>
> (5) The judgment of the Court shall be in the form of an answer to the question set out in the special case.

[11] There is no issue in relation specifically to the Rules of the Federal Court, but as the law presently stands, s 85(1) of the CJA is couched in mandatory language. Perhaps Parliament ought to consider amending the word 'shall' in s 85(1) to 'may' so that the Federal Court can also have the same discretion as the High court to decide for itself whether it wishes to entertain a special case transferred to it by the High Court. Until and unless that happens, it is my considered view that this court is obligated to hear cases validly transmitted to it by virtue of ss 84 and 85 of the CJA 1964.

[12] Further, having considered the definition of the word 'proceedings' in s 3 of the CJA 1964, O 1 r 4 and O 5 r 1 of the Rules of Court 2012, I agree with learned counsel for the appellant that the originating summons is pending before the High Court. This court can only answer the constitutional questions posed to it and not pass any other order or grant any relief to bring the proceedings to an end. That is an act which the High Court must perform, namely whether the originating summons ought to be dismissed or allowed with the reliefs sought.

[13] We also had the concern whether this court ought to have the power to refuse to answer constitutional references because otherwise, High Court judges would mechanically exercise their discretion to refer each and every such question to the Federal Court. In this regard, Suffian LP made the following observation in *Mark Koding v Public Prosecutor* [1982] 2 MLJ 120 ('Mark Koding'), where His Lordship said at p 123:

> Secondly, we would observe that it would have been better if the learned Judge had not referred this matter to us but instead had himself decided the constitutional questions which arose (he had jurisdiction to do so)... and decided the case one way or the other. If he had done that and there were an appeal to us, the whole matter would have been disposed of in two steps.

[14] In *Mark Koding*, three questions were referred to the Federal Court and it is pertinent to note that despite the above observation, Suffian LP and the rest of the Federal Court panel nonetheless considered and determined the reference in accordance with ss 84 and 85 of the CJA 1964, where the Federal Court answered some of questions referred. Guided by *Mark Koding*, I am thus of the view that this court should proceed to determine the reference, notwithstanding that the High Court judge may himself decide the constitutional matters referred to this court.

WHETHER THE CONSTITUTIONAL QUESTIONS RAISED IN THE PRESENT REFERENCE ARE 'ABSTRACT, ACADEMIC, OR HYPOTHETICAL'

[15] The general rule is that the Federal Court does not entertain abstract, academic, or hypothetical questions. This was stated by Edgar Joseph Jr FCJ in *Datuk Syed Kechik bin Syed Mohamed & Anor v The Board of Trustees of the Sabah Foundation & Ors and another application* [1999] 1 MLJ 257, who at p 264, observed as follows:

> Having said that, this court does not sit to decide abstract or academic or hypothetical questions of law regarding which the parties are not in dispute. Thus, in *Ainsbury v Millington* [1987] 1 All ER 929 (refd), Lord Bridge said this (at pp 930–931):
>
> > It has always been a fundamental feature of our judicial system that the Courts decide disputes between the parties before them; they do not pronounce on abstract questions of law when there is no dispute to be resolved.
>
> To the same effect is the case of *Sun Life Assurance Company of Canada v Jervis* [1944] AC 111 which shows that the House of Lords cannot deal with academic questions in which either or both parties is not interested in the result of the appeal.

[16] The principle was reiterated in subsequent Federal Court decisions in *Raphael Pura v Insas Bhd & Anor* [2003] 1 MLJ 513, at pp 546–547 and *Terengganu Forest Products Sdn Bhd v Cosco Container Lines Co Ltd & Anor and other applications* [2011] 1 MLJ 25, at para 13(h).

[17] The above cases however concerned the test for granting leave to appeal to the Federal Court under s 96 of the CJA 1964. The rule the above cases expound do not therefore have any application insofar as the determination of constitutional reference proceedings, filed pursuant to s 84 of the CJA 1964, is concerned.

[18] The most recent decision relating to the attitude of this court on abstract or academic constitutional questions is *Bar Council Malaysia v Tun Dato' Seri Arifin bin Zakaria & Ors (Persatuan Peguam-peguam Muslim*

Malaysia, pencelah) and another case [2018] MLJU 1288; [2018] 10 CLJ 129 ('Bar Council Malaysia'). This is what Zainun Ali FCJ held, at paras 63–64:

> We agree with the Attorney General Chambers [sic] that the issues in the motion are academic and that a judgment need not be issued by this court. We reiterate the view that it is not the function of the courts to decide hypothetical questions which do not impact on the parties before them. This point was well put by the Lord Justice Clerk (Thomson) in *Macnaughton v Macnaughton Trustees* [1953] SC 387, 392:
>
> > Our courts have consistently acted on the view that it is their function in the ordinary run of contentious litigation to decide only live, practical questions, and that they have no concern with hypothetical, premature or academic questions, nor do they exist to advise litigants as to the policy which they should adopt in the ordering of their affairs. The courts are neither a debating club nor an advisory bureau. *Just what is a live practical question is not always easy to decide and must, in the long run, turn on the circumstances of the particular case*.
>
> The above view was endorsed by Lord Scott of Froscoe in *R (Rusbridge & Another) v Attorney General* [2004] 1 AC 357, who said that 'the valuable time of the courts should be spent on real issues'. *The court does not act in vacuo nor does it act in vain. Shorn of the legal rhetoric, the fundamental purpose of the application was to ensure that the second and third respondents whose appointment [sic] have been alleged to be unconstitutional was to be removed from the position, or for them to vacate their position with immediate effect.* (Emphasis added.)

[19] In my view, the above decision is peculiar to the facts and circumstances of that case. Firstly, the factual situation of that case had become academic such that it no longer required resolution. This is expressed in the words of Zainun Ali FCJ who at para 65 said: 'The legal construction of the question posed was special in that factual context … [a]nd since matters have changed irrevocably by reason of their resignation, it is no longer tenable for the court to answer the question posed because the factual substratum underlying the question posed no longer exists. Therefore, the court would effectively be acting in a vacuum'.

[20] In contrast, the issue in the instant case is very much a live one. It concerns the validity of a law passed by Parliament. Article 4(1) of the Federal Constitution stipulates that a law passed by Parliament which is inconsistent with the Federal Constitution shall, to the extent of the inconsistency be void. Only the courts are exclusively seized with the power to make declarations of unconstitutionality. This constitutes the inherent power of the court in line with the doctrine of separation of powers, check and balance and the Rule of Law (see *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545, at para 33). Until and unless the courts affirmatively determine the validity of the law, no other person or body may flout the law on his own subjective view of the constitutional validity of it.

[21] There have been, in the past, constitutional references whereby the constitutionality of legislation has been called into question based on a specific 'factual substratum'. In *Badan Peguam Malaysia v Kerajaan Malaysia* [2008] 2 MLJ 285; [2008] 1 CLJ 521, the validity of the appointment of Dr Badariah Sahamid as a judicial commissioner was called into question. *Public Prosecutor v Gan Boon Aun* [2017] 3 MLJ 12 concerned the constitutional validity of a penal provision under which the respondent was charged. The *Bar Council Malaysia* case too concerned the constitutional validity of the appointments of certain judges. These cases, and perhaps other reference applications were indeed based on some discernible factual dispute. That said, I do not think they purport to set out a definitive test as to what constitutes an 'academic challenge'. As stated by Zainun Ali FCJ in the case of *Bar Council Malaysia*, 'Just what is a live practical question ... must in the long run, turn on the circumstances of the particular case'.

[22] I am aware that in some jurisdictions for example, in England, the courts have held that challenges to legislation in the abstract should only be done in 'exceptional cases' (see *Regina (Pretty) v Director of Public Prosecutions (Secretary of State for the Home Department intervening)* [2002] 1 AC 800 at p 851). Similar principles have been adopted in Hong Kong in the case of *Leung TC William Roy v Secretary for Justice* [2006] HKCU 1585; in Australia in *Croome v State of Tasmania* [1997] HCA 5; (1997) 142 ALR 397 and in the Singaporean case of *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476; [2012] SGCA 45). In my view these cases do not apply for two reasons. Firstly, in interpreting provisions of the Federal Constitution, in this case art 4, judicial precedent ought to play a lesser part than is normal in matters of ordinary statutory interpretation. Secondly, the Federal Constitution is primarily to be interpreted within its own four walls and not in the light of analogies drawn from other countries such as Great Britain, the United States of America or Australia (see *Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29; *The Government of the State of Kelantan v The Government of the Federation of Malaya and Tunku Abdul Rahman Putra Al-Haj* [1963] 29 MLJ 355; *Public Prosecutor v Pung Chen Choon* [1994] 1 MLJ 566).

[23] In this particular case, so long as the NSC Act 2016 exists in the statute books, the Executive are free to act on it. The argument in this case is that the NSC Act 2016 was not validly enacted, or, even if validly enacted, it was enacted in disproportion to the right of freedom of movement. The passing of the NSC Act 2016 causes it to exist and it affects all persons in Malaysia. The *lis* or live dispute before us is thus the validity of Parliament's act of enacting the NSC Act 2016 as against the Federal Constitution. In this context, I agree with the learned CJSS that the courts cannot take a 'wait-and-see' approach because a void law remains void. The challenge to its validity is not therefore

conditioned upon action by the Executive. I also agree that an examination of the drafting history of the Federal Constitution, and the permissive language of art 4 as a whole, confirms that judicial review over the validity of laws was intended to be as broad as possible. Accordingly, it is my considered opinion that this reference is not 'abstract, academic or hypothetical'.

[24] I accept that this case is unique because the challenge to the validity of the legislation is not grounded on some prior Executive act. I accept that it may be difficult in certain cases to determine the validity of certain legislation in the absence of a more specific factual circumstance apart from the passing of the Act itself. Some constitutional cases cannot be resolved by purely asking questions of law. A clear example of a case where the constitutional question was contingent upon a question of fact is the *Mark Koding* case. One of the questions reads as follows, at p 21:

> Having regard to the position of the Malay language as the national language under Article 152 Clause (1) of the Federal Constitution and questioning it would bring into operation section 3(1)(f) of the Sedition Act 1948 (Revised 1969) — can the demand for closure of Chinese and Tamil schools in the process of implementing the national language be legally and constitutionally treated as questioning the provision of proviso (a) of Article 152(1), notwithstanding that there is no demand for the abolition or prohibition of the teaching or learning of such languages?

[25] In deciding that the court was unable to answer the question because findings of fact were necessary, this is what Suffian LP held at p 121:

> We decided that it was premature and speculative to answer this question at this stage and advised counsel to address the submission he had prepared on it to the trial Judge to whom we remitted the case. We are of the opinion that the answer to this question is bound up with the facts of the case which were uncertain, as to which there were no findings as yet by the learned Judge; and so if we had proceeded we would have had to proceed on the basis of assumptions only. In particular Appendix A to the charge containing the speech about which complaint was made is a long one and whether or not it was seditious within the Act will depend on a reading of particular parts in it, on a reading of it as a whole and on consideration of the context in which it was made.

[26] Our law in s 84(2) of the CJA 1964 recognises the above situation which is why it stipulates that the High Court judge may transmit a special case at any stage of the proceedings 'having regard to the decision of such questions of fact as may be necessary to be settled to assist the Federal Court in deciding the question which has arisen ...'.

[27] The constitutional questions in the instant case are pure questions of law, and not mixed questions of law and fact. These proceedings therefore meet ss 84 and 85 of the CJA 1964 and can be decided in the affirmative or the

negative purely by reference to the questions of law.

[28] I am further of the view that permitting challenges of this kind is not an affront to the sanctity of the Rule of Law and unbefitting of the judicial role but, on the contrary, it accords completely with the Rule of Law. The present case is not an example of judicial supremacy but that of constitutional supremacy. In this regard, may I be permitted to cite an excerpt from the book by Tun Mohamed Suffian Hashim in *An Introduction to the Constitution of Malaysia* (3rd Ed, Pacifica Publications, 2007), at p 18:

> If Parliament is not supreme and its laws may be invalidated by the courts, are the courts then supreme? The answer is yes and no — the courts are supreme in some ways but not in others. They are supreme in the sense that they have the right — indeed the duty — to invalidate Acts enacted outside Parliament's power, or Acts that are within Parliament's power but inconsistent with the Constitution. But they are not supreme as regards Acts that are within Parliament's power and are consistent with the Constitution. The court's duty then is quite clear; they must apply the law in those Acts without question, irrespective of their private view and prejudice.

LOCUS STANDI

[29] The respondents objected to the appellant's locus standi at the initial hearing before the High Court. However, the objection seems to have been abandoned when the matter was remitted to the High Court and also when it came up for hearing before us. I agree that the Indian cases cited by the CJSS correctly state that locus standi cannot be waived. This is because locus standi is a common law rule invented by the courts to shut out meddlesome interlopers or frivolous suits thereby protecting the process of justice from abuse. Whether the courts ought to relax the rule will depend on the facts and circumstances of each case.

[30] In my view this is a suitable case to relax the locus standi rule. The Attorney General's Chambers has willingly agreed to defend the law that they were responsible for drafting and I see no reason why the court, at this stage, ought to deny the appellant the right to ventilate his claim when the government themselves are willing to defend it on the merits.

[31] In any event, upon proper consideration of the law, this is a public interest litigation brought with the view of vindicating the Rule of Law (see the judgment of the Federal Court in *Malaysian Trade Union Congress & Ors v Menteri Tenaga, Air dan Komunikasi & Anor* [2014] 3 MLJ 145, at para 48).

[32] The primary remedies sought at the High Court in this case are declarations of unconstitutionality. It is trite law that one need not have a complete cause of action when seeking a declaration because declarations may create or generate rights (see O 15 r 16 of the Rules of Court 2012 read together with *Tan Sri Haji Othman Saat v Mohamed bin Ismail* [1982] 2 MLJ 177 ('Othman Saat').

[33] While a plaintiff seeking a declaration in a private action requires some genuine interest in the matter, the same is not true of actions brought in the public interest especially if they concern the violation of a constitutionally guaranteed right. Thus, and with respect, I accept the CJSS's reading and application of the judgments in *Manoharan a/l Malayalam & Anor v Dato' Seri Mohd Najib bin Tun Hj Abdul Razak & Ors* [2013] 5 MLJ 186; [2013] 8 CLJ 1010 and *Robert Linggi v The Government of Malaysia* [2011] 2 MLJ 741; [2011] 7 CLJ 373. In addition, the following observations of Abdoolcader J (sitting in the Federal Court) in *Othman Saat*, at p 179, apply to this case:

> There are also some recent cases in which the plaintiff was allowed to sue, even though he had no real grievance or injury at all, as they involved matters of particular public concern (*Blackburn v Attorney-General* [1971] 1 WLR 1037; *Regina v Greater London Council, Ex parte Blackburn* [1976] 1 WLR 550; *Regina v Metropolitan Police Commissioner, Ex parte Blackburn* 7t March 1980), and the reasoning seems to have been that unless the court in its discretion gave the plaintiff a hearing, then no one would bring the matter to court.
>
> We would also refer to the very recent decision of the English Court of Appeal in *Regina v Horsham Justices, Ex parte Farquharson and Anor* [1982] 2 WLR 430, 446 where Lord Denning, MR, refers (at p 446) to the principle he had endeavoured to state in earlier cases which was endorsed by Lord Diplock in the House of Lords in *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1981] 2 WLR 722 (at p 737, 740) and again when he said (at p 740):
>
> > [I]t would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public-spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped.

[34] Therefore, I do not think the applicable test in a case such as this is for the appellant to show that he is peculiarly affected by the passing of the NSC Act 2016. He brings this action as a public-spirited citizen because the Act potentially affects him just as it affects any other person in this country. I therefore conclude that the appellant is clothed with the locus to mount this challenge.

A BASIC STRUCTURE DOCTRINE

[35] I concur with the learned CJSS in respect of the conclusions he has arrived at as regards the basic structure doctrine. While the existence of the doctrine is now well accepted in Malaysian jurisprudence beyond challenge, the question whether the constitutional amendments violate the basic structure doctrine does not arise as there has been no substantial change to the legislative process of which Royal Assent is a part. I therefore concur that it is unnecessary to answer this particular constitutional question.

C ARTICLE 149 OF THE FEDERAL CONSTITUTION

[36] I agree with the learned CJSS that applying the 'pith and substance doctrine' as articulated by the Supreme Court in *Mamat bin Daud & Ors v Government of Malaysia* [1988] 1 MLJ 119, the NSC Act 2016 is a security law. Being such a law, the NSC Act 2016 ought to have been enacted in accordance with art 149 of the Federal Constitution. The fact that it was not so enacted means it is in breach of art 149, rendering the whole Act unconstitutional.

[37] It has not escaped my attention that the NSC Act 2016 does not provide for preventive detention. However, art 149(1) does not demarcate between what constitutes anti-subversive powers and what does not. Some of the laws promulgated under art 149(1) allow for the establishment of certain national security institutions. Others suspend certain procedural and evidential safeguards while some others enable preventive detention. Article 149 instead generally permits Parliament to enact subversive laws for specific purposes detailed in limbs (a)–(f) of cl (1). The relevant subversive law may then be enacted to include certain powers necessary for the subversive elements it seeks to address. The power to detain a person without trial is thus merely a facet of anti-subversion measures or a national security law.

[38] In this sense, the inclusion of an art 149 in the recital in an anti-subversion law serves as a safeguard to ensure that any such law enacted is properly envisioned by the purposes enlisted in that article. It is a settled principle of constitutional construction that constitutional provisions and laws which safeguard fundamental rights must be read generously and in a prismatic fashion while provisions that limit or derogate from those rights must be read restrictively (see *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301, at para 13). Because art 149 is a safeguard of liberty, it cannot be construed to only include laws which cater for preventive detention. Such a reading, in my respectful view, would be inconsistent with art 149.

[39] For the foregoing reasons, the NSC Act 2016 ought to have been passed under art 149 because it is, in pith and substance, a national security and

anti-subversion law. I would therefore answer the constitutional question in respect of art 149 in the same way the learned CJSS has answered it.

ARTICLE 9(2) OF THE FEDERAL CONSTITUTION

[40] A law passed under art 149(1) is not subject to, inter alia, arts 5, 9, 10 or 13 of the Federal Constitution. As I have arrived at the conclusion that the NSC Act 2016 ought to have been passed under art 149 of the Federal Constitution, I do not find it necessary to deliberate on the substantive validity of the provisions of the NSC Act 2016 and the related constitutional questions whether such provisions are disproportionate to the freedom of movement guaranteed by art 9(2) of the Federal Constitution.

THE PRESUMPTION OF CONSTITUTIONALITY

[41] I am mindful that this judgment strikes down an entire Act of Parliament. Central to constitutional challenges is the presumption of constitutionality. Parliament embodies the will of the people. Striking down laws therefore has the 'undemocratic effect' of invalidating laws otherwise passed in accordance with the democratic process (see generally *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, intervener)* [2004] 2 MLJ 257). That said, where the law infringes the Federal Constitution, it is the constitutional duty of the courts to intervene consonant with the Rule of Law. This also affirms the notion that ours is a country which practices constitutional supremacy and not Parliamentary supremacy. In the context of these proceedings, the NSC Act 2016 infringes art 149 of the Federal Constitution. It is my finding that the presumption of constitutionality has been overcome and I accordingly have no alternative but to strike down the entire NSC Act 2016.

CONCLUSION

[42] To conclude, it is my view that this court is properly seized with the jurisdiction and has the constitutional obligation to hear this reference in line with the Rule of Law. In respect of the merits of the reference, I answer question 2(ii) set out in para [2] of this judgment in the affirmative and except for the declaration relating to art 9(2), I make the same orders as the learned CJSS has made, including the order that the High Court ought to determine the costs of these proceedings in accordance with s 83 of the CJA 1964.

David Wong CJ (Sabah and Sarawak) (delivering dissenting judgement):

THE REFERENCE

[43] This reference was filed by way of originating summons at the High Court in Malaya at Kuala Lumpur on 2 August 2016 ('OS'). The OS substantially seeks a declaration to the effect that the National Security Council Act 2016 ('the NSCA 2016') is unconstitutional.

[44] At the hearing at the High Court, the respondents raised two preliminary objections against the suit premised on two grounds:

(a) that the High Court has no jurisdiction to determine this dispute as the subject-matter of the challenge is for the exclusive jurisdiction of the Federal Court; and

(b) that the appellant does not have locus standi to maintain this suit.

[45] The High Court sustained the first preliminary objection considering itself bound by the judgments of the Federal Court in *Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors* [2014] 4 MLJ 765 (*Titular*) and *State Government of Negeri Sembilan & Ors v Muhammad Juzaili bin Mohd Khamis & Ors* [2015] 6 MLJ 736 (*Juzaili*) which judgments held that challenges such as these would have to be initiated directly at the Federal Court.

[46] On appeal to the Court of Appeal, the same objection was sustained premised on the concept of stare decisis, resulting in the dismissal of the same.

[47] The appellant filed a motion for leave to appeal to this court. As it happens, on or about the hearing of the leave motion, the Federal Court rendered judgment in *Gin Poh Holdings Sdn Bhd (in voluntary liquidation) v The Government of the State of Penang & Ors* [2018] 3 MLJ 417 ('Gin Poh') principally overruling its earlier two decisions in *Titular* and *Juzaili* (at para 33 of *Gin Poh*). In view of *Gin Poh*, the judgments of the High Court and the Court of Appeal dismissing the present reference no longer became the law of the land.

[48] At the hearing of the motion for leave to appeal in this court, respective counsel agreed, presumably premised on the judgment in *Gin Poh*, that the High Court had the jurisdiction to determine the dispute. Premised on that consensus, this court remitted the matter to the High Court for determination.

[49] Once the matter was remitted to the High Court, the appellant filed a reference application for the same to be transmitted to the Federal Court

pursuant to s 84 of the Courts of Judicature Act 1964 ('the CJA 1964') and r 33 of the Rules of the Federal Court 1995 ('the RFC 1995'). Again, no objection was raised by the respondent, the High Court agreed to the application and stated a special case on 14 March 2019.

THE CHALLENGE

[50] This reference in essence concerns the constitutional validity of the NSCA 2016. The appellant premises the challenge primarily on two grounds, namely:

(a) firstly, whether the NSCA 2016 was enacted pursuant to unconstitutional constitutional amendments. These constitutional amendments relate to the provisions of the Federal Constitution on Royal Assent. If these constitutional amendments were collectively null, void and of no effect, then it would follow, as a corollary, that the NSCA 2016, being enacted pursuant to them, is also unconstitutional. For clarity, the impugned constitutional amendments are as follows:

(i) s 12 of the Constitution (Amendment) Act 1983 (Act A566);

(ii) s 2 of the Constitution (Amendment Act) 1984 (Act A584); and

(iii) s 8 of the Constitution (Amendment) Act 1994 (Act A885);

(b) secondly, whether the substantive provisions of the NSCA 2016 are unconstitutional, null and void and of no effect on the following grounds:

(i) it was not enacted in accordance with art 149 of the Federal Constitution; and

(ii) that s 22 of the Act read with other sections violates the freedom of movement guaranteed by art 9(2) of the Federal Constitution.

QUERY BY THE PANEL

[51] At the hearing of this case on 6 August 2019, the panel posed to respective counsel a question as to whether this is a fit and proper case for s 84 of the CJA. Arising from that query, a question was posed as to whether there needs to be any 'pending proceeding' independent of the reference at the High Court before s 84 of the CJA comes into play. In other words, can this court determine an issue *in vacuo* or in the abstract? The locus standi of the appellant was also canvassed by the panel, though in my view, the appellant's locus standi is a non-issue for reasons as will be explained later.

A ISSUES TO BE DETERMINED

[52] Having taken into consideration what transpired between the panel and respective counsel and submissions from respective counsel, it is my considered view that this appeal raises four questions which are as follows:

B

(a) whether this reference by the High Court has complied with the conditions prescribed under ss 84 and 85 of the CJA requiring this court to hear the same;

C

(b) whether the relevant amendments to the Federal Constitution relating to Royal Assent are unconstitutional on the basis that they violate the basic structure doctrine; and

(c) in any event, whether the NSCA 2016 is unconstitutional because it was not validly enacted pursuant to art 149 of the Federal Constitution; or

D

(d) whether s 22 of the NSCA 2016 read together with other provisions of the Act is unconstitutional because it is inconsistent with the freedom of movement guaranteed under art 9 of the Federal Constitution.

E DECISION

Issue (a) — Whether this reference by the High Court has complied with the conditions prescribed under ss 84 and 85 of the CJA requiring this court to hear the same

F

[53] It should be made clear here, as shown earlier on, that both the appellant and the respondents were on the same page so to speak and had consented to this court deciding the constitutional questions in accordance with s 84 of the CJA. This issue of course was never raised by respective counsel and hence in my view should not be an issue of contention at all by any party. That said, this court had, out of abundance of caution, raised the question to ensure that it has jurisdiction to decide this reference.

G

H

[54] As jurisdiction can only be conferred by statute, parties' consent or submission to jurisdiction cannot arm a court with jurisdiction which it does not otherwise possess. A tried and tested authority for this is the judgment of the Privy Council in an appeal from India in *Meenakshi Naidoo v Subramaniya Sastri* (1887) LR 141 at p 166.

I

[55] The 'referral jurisdiction' of this court as contained in ss 84 and 85 of the Courts of Judicature Act 1964 ('the CJA') is derived from art 128(2) of the Federal Constitution. Article 128(2) of the Federal Constitution reads as follows:

(2) Without prejudice to any appellate jurisdiction of the Federal Court, where in any proceedings before another court a question arises as to the effect of any provision of this Constitution, the Federal Court shall have jurisdiction (subject to any rules of court regulating the exercise of that jurisdiction) to determine the question and remit the case to the other court to be disposed of in accordance with the determination.

[56] There arises a question as to whether in constitutional reference such as this case, the Federal Court has to answer or otherwise the constitutional issue referred to it despite there being no factual question being in dispute at the High Court. Is this constitutional reference academic, abstract or hypothetical?

[57] My answer to this is that, based on the clear wording of art 128(2) of the Federal Constitution and ss 84 and 85 of the CJA, the word 'any proceedings' appearing in those provisions are not tied with any further requirements that there must exist a concrete dispute or actual controversy affecting the rights and interests of the parties before this court can exercise its referral jurisdiction.

[58] Section 84 of the CJA reads as follows:

84(1) Where in any proceedings in the High Court a question arises as to the effect of any provision of the Constitution the Judge hearing the proceedings may stay the same on such terms as may be just to await the decision of the question by the Federal Court.

(2) An order staying proceedings under this section may be made by the Judge of his own motion or on the application of any party and shall be made at such stage of the proceedings as the Judge may see fit having regard to the decision of such questions of fact as may be necessary to be settled to assist the Federal Court in deciding the question which has arisen and to the speedy and economicaf finaf determination of the proceedings.

(3) Where an order for stay of proceedings has been made under this section the Judge shall state the question which in his opinion has arisen as to the effect of the Constitution in the form of a speciaf case which so far as may be possibfe shall state the said question in a form which shall permit of an answer being given in the affirmative or the negative.

(4) Where a Judge shall have stated a special case under this section the same shall be transmitted to the Federal Court in accordance with the rufes of court of the Federal Court.

[59] Section 85 of the CJA in turn reads:

85(1) Where a special case has been transmitted to the Federal Court under section 84, the Federal Court shall, subject to any rufes of court of the Federal Court, deaf with the case and hear and determine it in the same way as an appear to the Federal Court.

A (2) When the Federal Court shall have determined any special case under this section the High Court in which the proceedings in the course of which the case has been stated are pending shall continue and dispose of the proceedings in accordance with the judgment of the Federal Court and otherwise according to law.

B **[60]** Both ss 84 and 85 of the CJA along with the RFC 1995 govern the reference procedure. Section 84(1) prescribes two requirements to be met before a reference may be made:

(a) first, that there be any proceedings before the High Court; and

C (b) second, that a question arises as to the effect of any provision of the Constitution.

[61] Section 84(2) provides that a reference may be made by any of the D parties or by the High Court's own motion at *any* stage of the proceedings. On both requirements, it is the duty of the High Court to settle any issues of fact that may arise so as to assist the Federal Court to bring a speedy and economical final determination of the proceedings. Once the issues of fact are settled, the High Court is then encumbered by s 84(3) to state the constitutional questions E in a way that can be answered either in the affirmative or the negative and to then refer those questions to the Federal Court by way of a special case under s 84(4).

[62] Hence, the phrase '... as the Judge may see fit having regard to the F decision of such questions of facts as may be necessary to be settled to assist the Federal Court in deciding the question which has arisen and to the speedy and economical final determination of the proceedings' in sub-s 2 of s 84 of the CJA does not mean that there must be a question of fact or factual dispute between the parties before a constitutional reference can be made.

G

[63] This provision guides the High Court judge on when an order for a stay of proceeding shall be made when there is constitutional reference to the Federal Court. One of the considerations is the decision of such questions of fact as may be necessary to be settled to assist the Federal Court. The other H consideration is the speedy and economical final determination of the proceedings. This provision is not to be interpreted to impose a requirement that in every constitutional reference, there must be 'questions of fact'. The 'questions of fact' in this provision is one of the factors to consider when deciding the stage at which a stay of proceeding shall be made.

I

[64] I am aware of the fact that a guideline was drawn by the Court of Appeal in the case of *Wee Choo Keong v Lee Chong Meng & Anor* [1996] 3 MLJ 41 (*Wee Choo Keong*) concerning the circumstances at which constitutional reference can be made. In the words of Siti Norma Yaakob JCA, 'there must be a difficult

issue or issues posed by the dispute that are irreconcilable with a constitutional provision and it is only in this situation that reference of a constitutional question becomes necessary', while Abdul Malek Ahmad JCA stated that 'Read in its proper context, 'the effect of any provision', in my view, must surely mean a constitutional provision that has left room for doubt in the sense that it is vague or ambiguous which necessitates a proper construction of its interpretation from the Federal Court'.

[65] While I am fully aware that the guideline made by the Court of Appeal in *Wee Choo Keong* is not binding on the Federal Court, however, the effect of this case is apparent in *Mat Shuhaimi bin Shafei v Kerajaan Malaysia* [2015] MLJU 633 ('Mat Shuhaimi'), where, upon relying to *Wee Choo Keong*, the High Court Judge in *Mat Shuhaimi* decided that 'From the reading of s 85 CJA it is even clearer that there must be two separate and distinct issues, in that, firstly the Constitutional issue for the Federal Court to decide and secondly the substantive issue before the High Court. Therefore, there could not be one and a single issue'.

[66] With respect I do not see how a plain reading of s 85 indicates there must be two separate and distinct proceedings pending before the High Court before a constitutional reference may be made. The section cannot be read in isolation. The relevant portion of s 85(2) reads:

> When the Federal Court shall have determined any special case under this section the High Court in which the proceedings in the course of which the case has been stated are pending shall continue and dispose of the proceedings in accordance with the judgment of the Federal Court and otherwise according to law.

[67] Also, I cannot quite understand how s 85 of the CJA provides a construction or interpretation of s 84 of the CJA to mean that there must be some form of 'pending proceedings' before a reference may be made. The words in s 85(2) are quite clear in that the High Court 'shall continue and dispose of the proceedings in accordance with the judgment of the Federal Court and otherwise according to law'. The meaning of those words is clear and any interpretation contrary to what they mean would be ignoring to the intention of the drafter of the legislation.

[68] The position of the law, as circumscribed by the Federal Constitution, provides that both the High Court and the Federal Court will have the concurrent jurisdiction to determine constitutional questions. It can be said that the High Court judge controls which of those two Courts will make the determination as he or she is given the discretion whether to transmit or not subject to the only exception to this rule in any matter falling within arts 4(3), (4), and 128(1) of the Federal Constitution whereby only the Federal Court

will have the exclusive jurisdiction to determine such type of constitutional questions.

[69] Once that discretion is exercised by the High Court judge to refer the constitutional questions to the Federal Court, the Federal Court is required to hear and determine the constitutional question. The mandatory nature of s 85(1) of the CJA can be gleaned from the section itself:

> (1) Where a special case has been transmitted to the Federal Court ... the Federal Court *shall* ... deal with the case and hear and determine it in the same way as an appeal to the Federal Court. (Emphasis added.)

[70] The operative words here are 'shall deal'. What that means is simply that once a valid special case has been transmitted, the CJA makes it plain that the Federal Court has no choice but to decide those issues. I use the phrase 'valid special case' because I cannot discount the possibility of there being cases where the questions posed are not those pertaining the effect of the provisions of the Constitution. If I may say so here, this power to review whether the reference is a valid one resides in the inherent jurisdiction of this court.

[71] There may of course be other cases where the requirements of a special case have not been met and in such situations, the Federal Court has the power to remit the case to the High Court but certainly not on the basis that the Federal Court has some apparent discretion to refuse the High Court's transmission of the special case — but on the basis that there is no special case to begin with.

[72] It can be said that where there is in law no special case, the Federal Court would have no jurisdiction under s 84. It is only in those circumstances the Federal Court may remit the case to the High Court for determination.

[73] Whatever be the case, it is my considered view that the originating summons filed by the appellant herein is properly a proceeding pending before the High Court. As I see it, based on my reasons aforementioned, no matter how this court decides the constitutional questions in the present case, the final decision to either dismiss the summons or to allow it and the declarations prayed for is still a matter for the High Court to complete.

[74] For clarity, the duty of this court is *only* to decide the constitutional questions. It has no power to make orders on the disposal of the case. That final power of disposal lies in the hands of the High Court even if that power constitutes the simple and straightforward exercise of dismissing the case outright, or, allowing it and granting declarations or other remedies consonant with the Federal Court's determination of the constitutional questions.

[75] I must also mention the case of *Badan Peguam Malaysia v Kerajaan Malaysia* [2008] 2 MLJ 285; [2008] 1 CLJ 521 ('Badan Peguam Malaysia') where the appellant there did exactly what the appellant here did. The appellant there framed specific questions relating to the constitutionality of the appointment of Dr Badariah Sahamid as a judicial commissioner. They filed the action by way of an originating summons at the High Court. The appellant then made an 11th hour application under s 84 of the CJA to transmit the matter to the Federal Court. That application was allowed and the special case was transmitted to the Federal Court. The majority of the Federal Court answered the questions against the appellant and thus effectively upheld the appointment of Dr Badariah as a judicial commissioner.

[76] It will be noted that the decision of the Federal Court rendered the entirety of the matter at the High Court academic and that all there was left to do was to either dismiss or allow the summons in accordance to the decision of the Federal Court. There was no complaint, nor do I think there could have been one on how the matter before the High Court would have become academic.

[77] The essence of the concern here however is that while *Badan Peguam Malaysia* settles the 'making academic' point it does not resolve the issue on how any person can challenge the constitutionality of legislation *in vacuo* ie in abstract. In other words, some might hold the view that there must be some form of factual dispute (as there was in the *Badan Peguam Malaysia* case) requiring some form of resolution by the court. It might be said, that the case herein is merely an abstract challenge on the constitutional validity of legislation. There is no factual circumstance requiring resolution.

[78] Even if it is accepted that declarations may create rights, and that the appellant need not establish a cause of action, it might be argued that the court ought not to determine the validity of Acts of Parliament in abstract. Tempting as it is, I must reject the argument. If one looks at it holistically, there is in fact no vacuum as the subject matter here is the NSCA 2016 and the complaint is that Parliament had breached its constitutional duty by passing an unconstitutional Act. Here the appellant is a prominent lawmaker, surely he has a constitutional duty to the people to ensure that the statutes do not contravene the highest law of the land, ie the Federal Constitutional which I may add belongs to all the people of this country, all of which have a vested interest to ensure that it is not violated.

[79] Must we, the court, wait idly by for someone to be arrested or, for instance in this case, the Executive to exercise their powers under the NSCA 2016 and for someone to be adversely affected before the validity of that statute or its provisions may be challenged? In other words, is it the untenable general

proposition that we must first wait for the Executive to act on the law before the validity of that law may be called into question? Surely the answer is an emphatic 'no' as there has been constitutional breach by the Legislature. Judges when taking their oath of office swear a constitutional oath to protect, defend and preserve the Constitution. As the only guardian of the Constitution, the courts must not only not wait but must also ensure that the path to seek justice is not littered with unnecessary hurdles such that access to justice becomes illusory.

[80] The cornerstone of constitutional supremacy stems from art 4(1) of the Federal Constitution and it reads as follows:

> This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

[81] It is patently clear from the language of art 4(1) that any law inconsistent with the Federal Constitution is void. The word 'void' is self-explanatory — any law made in excess of the Federal Constitution once declared by a court of competent jurisdiction to be null, void and of no effect ceases to exist as law. Any judicial declaration to that extent would effectively delete that law or the relevant portion of that law from existence. This is not judicial supremacy but constitutional supremacy. It is only the courts that have the affirmative and final power to put beyond rest that the law was made in excess of Parliamentary power or within Parliamentary power but inconsistent with the Federal Constitution.

[82] I said earlier, that we cannot take the 'wait and see' approach. Meaning, one need not wait for a void law to be employed before its constitutionality may be challenged. I think my view is fortified even on a purposive interpretation of the Federal Constitution.

[83] The present art 4(1) of the Federal Constitution is actually the product of disagreement between the drafters of the Federal Constitution in respect of the original draft arts 3 and 4 of the Federal Constitution. See generally:

(a) Khoo Boo Teong, *Rule of Law in the Merdeka Constitution* [2000] JMCL 59; and

(b) KC Vohrah, Philip Koh and Peter Ling, *Sheridan & Groves — The Constitution of Malaysia* (5th Ed, Malayan Law Journal Sdn Bhd, 2004) at pp 39–40.

[84] Draft art 3 of the Federal Constitution read as follows:

3 The Rule of Law

(1) This Constitution shall be the supreme law of the Federation, and any provision of the Constitution of any State or of any law which is repugnant to any provision of this Constitution shall, to the extent of the repugnancy, be void.

(2) Where any public authority within the Federation or within any State performs any executive act which is inconsistent with any provision of this Constitution or of any law, such act shall be void.

[85] The relevant portion of the draft art 4 read as follows:

4 Enforcement of the Rule of Law

(1) Without prejudice to any other remedy provided by law —

(a) Where *any person alleges that any provision of any written law is void, he may apply to the Supreme Court for an order so declaring and,* if the Supreme Court is satisfied that the provision is void, the Supreme Court may issue an order so declaring and, in the case of a provision of a written law which is not severable from other provisions of such written law, issue an order declaring that such other provisions are void.

(b) Where any person affected by any act or decision of a public authority alleges that it is void because —

(i) *the provision of the law under which the public authority acted or purported to act was void,* or

(ii) the act or decision itself was void, or

(iii) where the public authority was exercising a judicial or quasi-judicial function that the public authority was acting without jurisdiction or in excess thereof or that the procedure by which the act or decision was done or taken was contrary to the principles of natural justice,

he may apply to the Supreme Court and, if the Court is satisfied that the allegation is correct, the Court may issue such order as it may consider appropriate in the circumstances of the case; (Emphasis added.)

[86] One need only read draft arts 4(1)(a) with draft art 4(1)(b)(i) to realise that even as far back as the 1950s, the framers of our Federal Constitution had intended that the Rule of Law may be enforced either by challenging the validity of legislation directly via proceedings for a declaration (like the one in the present case) or indirectly, that is to say collaterally challenge legislation as applied by the Executive.

[87] It is evident that draft art 4 was rejected in entirety whereas draft art 3 was converted into the present art 4(1) and crafted in broader terms without explicit reference to the Executive. The rejection of draft art 4 (in particular

A para (a) thereof), is not evidence of rejection of the notion that the validity of legislation may only be challenged through Executive action. The reason for the rejection was explained in the *Government White Paper* at para 53:

> It has been agreed that the Federal Constitution should define and guarantee certain fundamental rights, and it is proposed to accept the principles recommended by the Commission for inclusion in Part II of the Federal Constitution although there have been some changes in drafting. *The Article proposed by the Commission on the subject of enforcement of the rule of law was, however, found unsatisfactory and has been omitted on the ground that it is impracticable to provide within the limits of the Constitution for all possible contingencies. It is considered that sufficient remedies can be best provided by the ordinary law.* (Emphasis added.)

[88] Therefore, draft art 4 was rejected not because the drafters considered it repugnant to the very ethos of the Federal Constitution, but that they intended for that document to be even broader than what the draft itself proposed. They intended to word the article more permissively rather than restrictively because the broader necessarily includes the narrower. So, by removing draft art 4 (the enforcement of the Rule of Law), and refining draft art 3 (which is now art 4), the framers intended for the supremacy of the Federal Constitution to be stretched as widely as possible.

[89] As I have stated, and I think this bears repeating, the result of the above analysis clearly suggests to me that we must not in the least be swayed by fears that each and every case calling for the determination of constitutional questions will be transmitted to the Federal Court without any 'control mechanism'. For reasons already indicated, those mechanisms formulated and applied in *Wee Choo Keong* and *Mat Shuhaimi* are clearly baseless in light of the clear language of the law in art 128(2) of the Federal Constitution and ss 84 and 85 of the CJA, and the drafting history of our Federal Constitution. This is and will continue to be the position of our law for as long as ss 84 and 85 exist in their present form. But until and unless Parliament amends the language of that statute, I think it is far from the duty of this court to rewrite the CJA in a manner more palatable and convenient to it.

[90] I therefore find no merit in the argument that this court is not properly placed to answer the constitutional questions as posed *in vacuo*. This is a fit and proper case for such resolution because the NSCA 2016 exists as a law passed by Parliament. Deciding its validity notwithstanding that the Executive have not used it is not a resolution of a dispute *in vacuo*. The act which infringes the Federal Constitution is the passing of the NSCA 2016 by Parliament. The complaint here is against the Parliament. Hence to say that we are deciding something *in vacuo* is factually incorrect and hence without merit. The Legislature as well as the Executive are subject to the prohibitions prescribed in the Federal Constitution. As rightly pointed by Barwick CJ in *Cormack v*

Cope (1974) 3 ALR 419; (1974) 131 CLR 432 this court has a constitutionally duty to intervene when there has been a transgression and this is how the Chief Justice puts it:

> ... Whilst it may be true the court will not interfere in what I would call the intra-mural deliberative activities of the Parliament, it has both a right and a duty to interfere if the constitutionally required process of law-making is not properly carried out ...

[91] Having said that, I am mindful to confine that opinion to the facts of this. All future cases will still have to be examined on their particular circumstances whether the issues in such cases may be resolved purely on questions of law. In other words, in future challenges, the courts will still have to assess whether the constitutionality of the legislation may be determined purely on a point of law, or whether some factual basis is a necessary pre-requisite.

Locus standi

[92] Earlier on I have stated that the issue of locus standi is a non-issue for there was no such objection by the respondents during the substantive hearing of this reference as can be seen from the submission of the learned senior federal counsel. Be that as it may, prudence dictates that we deal with this matter so that all grounds are covered.

[93] The purpose of requiring locus standi in public litigation is to ensure that there are no frivolous litigations before the courts. This much is clear from the judgment of the Supreme Court in *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12 (*Lim Kit Siang*). Whether the rule ought to be enforced or relaxed is necessarily for the courts to determine. Waiver under 'ordinary circumstances' cannot therefore operate to diminish or mitigate the locus standi rule. That a party cannot be conferred locus standi by waiver ie by the other side's failure to object (or abandon such an objection) is manifest in the following dictum of the Supreme Court of India in *SP Anand, Indore v HD Deve Gowda & others* (1996) 6 SCC 734 at para 18:

> [I]t must also be borne in mind that no one has a right to the waiver of the locus standi rule and the court should permit it only when it is satisfied that the carriage of proceedings is in the competent hands of a person who is genuinely concerned in public interest and is not moved by other extraneous considerations ...

[94] In this case, one must not overlook the fact that the attorney general did not make any objection and this to me is not without significance bearing in mind that the attorney general is the government's main advocate and as most recently reaffirmed by this court in *PCP Construction Sdn Bhd v Leap*

Modulation Sdn Bhd (Asian International Arbitration Centre, intervener) [2019] 4 MLJ 747; [2019] 6 CLJ 1 ('PCP Construction'), is also the guardian of public interest. His dual capacity makes the attorney general's position unique and in a matter of constitutional challenge as we have here, the lack of objection by the attorney general or his chambers should and in my considered view be taken as a reason for the courts to relax the locus standi rule. Though we do not expect the attorney general to overtly challenge the constitutionality of any legislations which his chambers helped to draft, the attorney general however bearing in mind that he is also the guardian of public interest should take an open stand when it comes to such constitutional challenge especially so when it affects the basic fundamental rights of the citizens of this country.

[95] With such an open stand, it will at least overcome the problem expounded in *Lim Kit Siang* by the dissenting judgment of Abdoolcader SCJ in respect of locus standi in public interest litigation where he said as follows (at p 45):

> The contention of the appellants is that in matters such as that before us it is only the Attorney-General himself moving *suo motu* or by the grant of a fiat for a relator action who has the right to challenge and can take action and no other. *I would think it would be too much to expect process of this nature involving the ventilation of a public grievance to proceed only through this channel, given even the fortitude the incumbent of the office would presumably be endowed with, in view of the rebound where the complaint is against the Government itself and the Attorney-General is its legal adviser, as it would surely be expected that if the complaint merited action by the Attorney-General or by his fiat to a relator, he would himself in the first instance have had the cause of complaint aborted before its overt manifestation ...*
>
> I am not therefore impressed that the road to relief in regard to public law issues can be travelled only with the permission of the Attorney-General. *To deny locus standi in the instant proceedings would in my view be a retrograde step in the present stage of development of administrative law and a retreat into antiquity.* (Emphasis added.)

[96] I am aware that in *Lim Kit Siang,* the differences of opinion between the majority and the minority lie on their treatment of the nature of the claim as either private or public matter. The majority adopted the test of locus as applied in the private claim while the minority adopted liberal approach of standing and treating the case as within the purview of public interest litigation, hence the different test used.

[97] The constitutional challenge as in the present case does fall under the area of public law, hence the rule of standing as applied by the majority in *Lim Kit Siang* is not proper to be applied.

[98] I had an opportunity to deal with this issue of locus standi in *Robert Linggi v The Government of Malaysia* [2011] 2 MLJ 741; [2011] 7 CLJ 373

where I took a view quite similar to that of Abdoolcader SCJ. My views were adopted and applied in *Manoharan a/l Malayalam & Anor v Dato' Seri Mohd Najib bin Tun Hj Abdul Razak & Ors* [2013] 5 MLJ 186; [2013] 8 CLJ 1010, CA.

[99] Therefore, in a case where 'the complaint of the plaintiff is that the federal government or its agent has violated the Federal Constitution by its action or legislation, he has the locus to bring an action to declare the action of the federal government or its agent as being unconstitutional, without the necessity of showing that his personal interest or some special interest of his has been adversely affected' (per Hishamudin Mohd Yunus JCA in *Manoharan a/l Malayalam*).

[100] In fact, the proposition is so obvious that it should not need authority. Any contrary proposition would lead to absurdity and I can do no better than to quote the words of Abdoolcader SCJ from *Lim Kit Siang* (at p 45):

> The effect of the denial of standing in such circumstances would be, and it has indeed been so suggested, that we will have to fold our arms and do nothing, in which event I would add we might also as well have to hang our heads in sorrow and perhaps even in mortification in *not being able to at least entertain for consideration on its merits any legitimate complaint of a public grievance or alleged unconstitutional conduct.* (Emphasis added.)

Issue (b) — The basic structure doctrine and the constitutionality of the constitutional amendments affecting Royal Assent

[101] From the outset, it should be noted that NSCA 2016 is the only legislation in Malaysia enacted pursuant to art 66(4A) of the Federal Constitution, meaning that the assent of the Yang di-Pertuan Agong ('YDPA') was assumed by the fact that 30 days, the time limit prescribed by art 66(4) of the Federal Constitution, had elapsed from when the National Security Council Bill was presented to the YDPA. For convenience, the two impugned clauses of art 66 read as follows:

> ... (4) The Yang di-Pertuan Agong shall within thirty days after a Bill is presented to him assent to the Bill by causing the Public Seal to be affixed thereto.
>
> (4A) If a Bill is not assented to by the Yang di-Pertuan Agong within the time stipulated in Clause (4), it shall become law at the expiration of the time specified in that Clause in the like manner as if he had assented thereto ...

[102] The assumed Royal Assent is stated in the Act itself and reads as follows:

Date of Royal Assent	... ...	18 February 2016 (pursuant to Clause (4A) of Article 66 of the Federal Constitution)

[103] Premised on the lack of actual assent, learned counsel for the appellant fashions his argument this way. Royal Assent to any bill forms part of the basic structure doctrine of the Federal Constitution, and as such the relevant constitutional amendments (art 66(4A)) effectively violated the doctrine.

The history of the basic structure doctrine in Malaysia

[104] The basic structure doctrine, in its present form, stems from judicial development by the Indian courts. It first sprouted through Mudholkar J's minority view in *Sajjan Singh v State of Rajasthan* 1965 AIR 845, where His Lordship observed that:

> ... [f]eatures of the Constitution that are an amplification or concretization of the concepts set out in the preamble of the same cannot be amended by Parliament.

[105] The doctrine later gained traction through the Supreme Court's decision in *Golaknath & Ors v State of Punjab & Anr* 1967 AIR 1643, where it held that fundamental rights were non-amendable through the constitutional amending procedure established in art 368 of the Indian Constitution.

[106] This doctrine finally cemented through the Indian Supreme Court's celebrated decision in *Kesavananda Bharati v State of Kerala and Anr* 1973 4 SCC 225 where the Supreme Court held that the Parliament's amending power under art 368 is not absolute, and is subject to the condition that any purported amendments must not destroy the basic features of the Indian Constitution.

[107] The Indian Supreme Court went to the extent of enumerating several basic features of the Indian Constitution including: the supremacy of the Indian Constitution, the republican and democratic form of government and sovereignty of the country, the secular and federal character of the Indian Constitution, the demarcation of power between the Legislature, Executive and the Judiciary, and the dignity of the individual. Such basic features, the court opined, were not only discernible from the preamble, but also from the whole scheme of the Indian Constitution.

[108] It can be said that the Federal Court case of *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333; [2010] 3 CLJ 507 (*Sivarasa*) represents the first case in this country which expressly and openly embraced the doctrine of basic structure. At para 8, Gopal Sri Ram FCJ held as follows:

> Further, it is clear from the way in which the Federal Constitution is constructed *there are certain features that constitute its basic fabric*. Unless sanctioned by the Constitution itself, any statute (including one amending the Constitution) that offends the basic structure may be struck down as unconstitutional. Whether a particular feature is part of the basic structure must be worked out on a case by case basis. Suffice to say that the rights guaranteed by Part II which are enforceable in the courts form part of the basic structure of the Federal Constitution. (Emphasis added.)

[109] Eventually, the doctrine was finally recognised and applied by our apex court in *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561 and *Indira Gandhi*. In those cases, two separate panels of the Federal Court unanimously held· that the constitutional amendment to art 121 of the Federal Constitution could not purport to remove or curtail the judicial power of the courts as doing so would offend the basic structure of the Federal Constitution.

[110] What remains clear at this juncture is that the assertion that there is no such thing as basic structure doctrine, may no longer be made.

[111] While the existence of the basic structure doctrine is now settled, what remains to be determined in each and every case is whether a particular feature forms part of the basic structure. In this case, whether the constitutional amendments to the Royal Assent violated the basic structure of our Federal Constitution.

The procedural history of the impugned constitutional amendments

[112] Section 12 of Act A566 purported to amend art 66 by introducing a system of automatic assent by the YDPA in a period of 15 days.

[113] The Bill of the said Constitutional Amendment Act introduced a new cl (5A), and redrafted cl (5) in such terms:

> (5) A Bill shall become law on being assented to by the Yang di-Pertuan Agong. If *for any reason whatsoever the Bill is not assented to within fifteen days of the Bill being presented to the Yang di-Pertuan Agong, he shall be deemed to have assented to the Bill and the Bill shall accordingly become Jaw.* (Emphasis added.)

[114] The amendment was the subject of strong protest from the Conference of Rulers, so the Bill was accordingly amended and passed as Act A566 in its present form.

[115] Thereafter, the Federal Constitution was re-amended vide Act A584. In s 2 of Act A584, a procedure enabling the YDPA to object to a Bill and which ultimately allowed the Government to bypass the YDPA's objection through the 30 day time period, was introduced vide art 66(4A) which stipulates as follows:

> (4A) If the Yang di-Pertuan Agong returns a Bill to the House in which it originated in accordance with Clause (4)(b), *the House shall as soon as possible proceed to reconsider the Bill.* If after such reconsideration *the Bill is passed by the votes* of not less than two-thirds of the total number of members of that House in the case of a Bill for making any amendment to the Constitution other than an amendment excepted pursuant to Article 159, and by a simple majority in the case of any other Bill, with or without amendment, *it shall be sent together with the objections to the other House,* by which it shall likewise be reconsidered, and if similarly approved by members of that House, the Bill shall again be presented to the Yang di-Pertuan Agong for assent *and the Yang di-Pertuan Agong shall give his assent thereto within thirty days after the Bill is presented to him.* (Emphasis added.)

[116] This elaborate procedure was watered down and simplified through further amendment, that is vide Act A885. This amendment produced the present version of art 66(4A). Section 8 of that Act states the new version (which for convenience I reproduce as follows):

> (4) The Yang di-Pertuan Agong *shall within thirty days after a Bill is presented to him assent to the Bill* by causing the Public Seal to be affixed thereto.
>
> (4A) If a Bill is not assented to by the Yang di-Pertuan Agong within the time specified in Clause (4), *it shall become law at the expiration of the time specified in that Clause in the like manner as if he had assented thereto.* (Emphasis added.)

Contentions of the appellant

[117] The appellant contends that the Royal Assent is an Executive act performed by the YDPA under the Constitution. In support, the appellant relies on two decisions of the High Court of Australia in *Cormack v Cope* (*Cormack*) and *McDonald v Cain* [1953] VLR 411 (*McDonald*).

[118] During the course of the hearing, learned counsel for appellant argued that the insertion of cll (4) and (4A) of art 66 in their present form are superfluous because the YDPA acts in accordance to the advice of the Cabinet. Should there arise a situation, learned counsel argued, where the YDPA withholds assent, it is perfectly within the power of the Executive to take out sanctions against the YDPA under art 38 of the Federal Constitution. In the alternative, the appellant argued that the Federal Government may also avail itself of the procedure of the Special Court under art 182 of the Federal Constitution should the YDPA refuse to act in accordance with such advice.

Contention of the respondents

[119] The respondents took the view that the Royal Assent is an exercise of Legislative function. In another word, art 66 forms part of legislative procedure and the YDPA's exercise of Royal Assent thereunder therefore forms part and parcel of legislative power. The respondents further argued that Royal Assent is a non-discretionary power and must be exercised in all cases before and after the relevant constitutional amendments. Hence, there is no practical difference between the original art 66 and its present form.

[120] Royal Assent remains still part and parcel of the legislative process except that it is now subject to a 30 day time limit. This 30 day time limit in substance did not change the process as the YDPA as conceded by the appellant had no discretion in granting assent as YDPA acts on the advice of the Prime Minister. Thus, the respondents reject the appellant's argument that there has been a change to the basic structure of the Federal Constitution.

My view

[121] In deliberating this issue, my starting point is to determine what powers exactly the YDPA exercises when assenting to Bills. Is it an Executive one or a Legislative one? The distinction is important because, according to the respondents, the impugned constitutional amendments brought about no substantive change to the legislative process.

[122] As the appellant had relied heavily on the two Australian authorities in *Cormack* and *McDonald*, I shall begin my task by analysing the same and determine whether they say what the appellant says they stand for.

[123] The facts of *Cormack* were these. The plaintiffs comprised two members of the Australian Senate. They sought various remedies including declarations, inter alia, that the proclamation issued by one of the defendants (the then Governor-General of Australia) convening a joint sitting of the Members of the Senate and the House of Representatives as being invalid, void and of no effect. They also prayed for an interim injunction against the defendants to restrain them from introducing any of the proposed laws in that joint sitting.

[124] The central issue before the High Court of Australia (relevant to this reference) was whether the Governor-General lawfully issued the said proclamation. Upon reading the facts of the case again and again, I find that they are even remotely similar to the facts at hand. The learned attorney general acting for the defendants in that case argued that the proclamation was issued by the Governor-General's in his exercise of legislative power. It was therefore argued that the court had no basis to interfere. In rejecting the argument,

Barwick CJ said as follows at pp 453–454:

> Thus there are two distinct answers to the submission made by the Attorney-General. *First of all, in my opinion, the Governor-General in convening a joint sitting or, for that matter, in dissolving both Houses, is not participating in the parliamentary process of law-making in any relevant sense. His act of dissolving both Houses and his direction for the convening of a joint sitting is in each instance an executive act.* It is an act of the Crown in pursuance of a statute, the Constitution, and within the cognizance of the Court. (Emphasis added.)

[125] The point made by Barwick CJ was that the said act of proclamation was not part of the legislative process. A closer reading of the learned Chief Justice's judgment suggests to me that a proclamation could not be considered a legislative function because it, strictly speaking, is not a part of the law-making process.

[126] His Honour did however suggest, in obiter, that the act of Royal Assent is part of the legislative process. I am fortified in this view by what Barwick CJ continued to say at p 453:

> The Crown's sole part in the parliamentary process of law-making does not begin until the proposed law has been passed by both Houses or affirmed in a joint sitting and *is presented for the Royal assent* ... Ordinarily, the Court's interference to ensure a due observance of the Constitution is in connexion with the making of laws is effected by declaring void what purports to be an Act of Parliament, after *it has been passed by the Parliament and received the Royal assent.* In general, this is a sufficient means of ensuring that the processes of law-making which the Constitution requires are properly followed, and in practice so far the Court has confined itself to dealing with laws *which have resulted from the parliamentary process.* (Emphasis added.)

[127] In short, the learned Chief Justice of Australia was seemingly of the view that Royal Assent is part of the law-making powers of Parliament and as such, finds itself as part of the larger parliamentary process. It is for this reason why I do not see how *Cormack* lends support to the appellant's proposition that the Royal Assent is an Executive act.

[128] I now turn my attention to *McDonald*. The plaintiff, a member of the Victorian State Legislature sought, inter alia, a declaration against the defendants (Victorian Ministers and the Parliamentary Clerk) from presenting a bill for an act intituled the Electoral District Act 1953 to the Governor for consent which had not been passed by an absolute majority from the Legislative Council of the State though it had been passed prior by the Legislative Assembly with an absolute majority.

[129] From my reading of that case, it was not so much whether the Act of Royal Assent is or is not a Legislative act. It was more of whether the courts have

the power to declare void and to thereby injunct the presentation of a Bill not validly passed for Royal Assent. It was also argued by the parties opposing the action in that case that granting the declarations and/or the injunction would prohibit the Ministers from advising the Governor as to whether he ought to assent or not. The Supreme Court of Victoria unanimously dismissed the action.

[130] As a general note, each of the three justices deciding the case held that the courts, in certain instances, can rule on the validity of certain Parliamentary acts. On the facts, the Victorian Supreme Court unanimously held that the Bill was not one which required an absolute majority. For all intents and purposes, there was therefore no affirmative ruling as to whether Royal Assent constituted an Executive or Legislative exercise of power. To reiterate, the main thrust of the case was whether the Parliamentary Clerk could be injuncted from presenting the impugned bill for Royal Assent and as a corollary, whether the Ministers could be injuncted from advising the Governor of the State from assenting.

[131] In the Australian High Court case of *Kirmani v Captain Cook Cruises Pty Ltd and another* (1985) 58 ALR 29, both Brennan and Dawson JJ had made some very pertinent observations. At p 103, Brennan J pertinently observed how Royal Assent is a legislative act but can at times be subject to advice from the Executive. This is what his honour said:

> *Royal assent is part of the legislative process and the Crown has at all times been and remains the legislative head of the State legislatures.* True it is that in exercising the power of assent under ss 735 and 736, whether in the form of confirmation, approval or the signification of Her Majesty's pleasure, *the Crown would be acting on the advice of Her Majesty's United Kingdom Government, but that does not mean that the assent is any the less part of the legislative process.* The power of the Queen to disallow legislation may be seen in both the Constitutions of the States and of the Commonwealth.
>
> The fact that, at least in the case of the Commonwealth *(see Constitution, ss 58 and 59), the power is now exercisable only upon the advice of the Queen's Commonwealth Ministers and is hence for all practical purposes a dead letter, is a matter of convention rather than constitutional theory and it must be recognized that at its inception that power was exercisable upon the advice of the Queen's United Kingdom Ministers: see Report of the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation 1929, p 11.*
>
> It could not be suggested that the statutory power of disallowance to be found in the Commonwealth Constitution itself in any way diminishes the authority of the Commonwealth Parliament over the matters with respect to which it may make laws any more than the requirement in ss 735 and 736 of the Merchant Shipping Act that Royal assent or confirmation be given in a particular manner diminishes the authority of the State legislatures over the matters with which those sections deal. (Emphasis added.)

[132] Dawson J made similar observations at p 76:

> The conditions imposed by ss 735 and 736 respectively are no mere matter of procedure. The Imperial Government's concurrence is required before a State Act can repeal any of the provisions of the Merchant Shipping Act or regulate the coasting trade of a State. *Confirmation by Her Majesty in Council as required by s 735 is not merely the Royal assent which may be a step in a State legislative process.* What is required is the confirmation of an Act already passed and assented to. Confirmation is to be given on advice of the Ministers of the United Kingdom Government. (Emphasis added.)

[133] Reverting to the Malaysian position, I start my deliberation with arts 39 and 40 of the Federal Constitution. The former clearly stipulates that the Executive authority of the Federation shall be vested in the YDPA while the latter lists out the general rule that unless the YDPA is given absolutely the legal right to exercise his own discretion, the YDPA is bound to exercise such discretion on the advice of the Cabinet.

[134] In all this, it must not be missed that art 44 of the Federal Constitution stipulates that Parliament shall consist of three parts one of which is the YDPA. Article 66 of the Federal Constitution bears the shoulder note reading: 'Exercise of legislative power'. It is under this shoulder note that art 66(4) and (4A), ie provisions relating to Royal Assent, are placed.

[135] It must also be noted that both arts 39 and 44 are placed under the general header of 'Part IV — The Federation'. This to me indicates the fusion of the federal Executive and Legislative branches of government. But while the two articles may very well be placed under the same general header, the two articles are placed under two separate Chapters. Article 39 is placed under Chapter 3 — The Executive; whereas art 44 is placed under Chapter 4 — Federal Legislature. The placement of those two articles speaks for itself in that the Royal Assent is very much part of the legislative process.

[136] My view is corroborated in para 64 of the Reid Commission Report 1957 which clearly sets out our legislative process which makes the Royal Assent part of the same:

> We are directed to base our recommendations on Parliamentary democracy, and in our view the principles of Parliamentary democracy require that *ultimate responsibility should rest with that House of Parliament which has been elected by direct elections.* A Bill as passed by one House will go to the other House and any amendments made there will be sent back to the House in which the Bill originated. If these amendments are accepted *the Bill will become law on receiving the assent of the YDPA.* (Emphasis added.)

[137] The respondents take the position that the relevant constitutional amendments impugned herein did not bring about any substantive change to the issuance of the Royal Assent. To the respondents, the appellant's case rests on a fallacy that the YDPA exercises his discretion in giving assent to a Bill. It is the respondents' contention that the YDPA does not exercise his own discretion in the matter of Royal Assent. This point was also conceded by the appellant, and I think correctly, that the YDPA when presented with a Bill, must assent to it.

[138] But, according the appellant, the issue is not so much of the lack of the choice on part of the YDPA to assent. Rather, the appellant argues, as already highlighted earlier, that the existence of automatic assent essentially amounts to superfluity in the amendments to art 66 which have the effect of bypassing the requirement of assent. This is because, according to the appellant, if the YDPA for whatever reason refuses to assent, he will have to no less assent if so advised by the Cabinet to assent.

[139] With respect, this argument does not make sense as it ignores the contention of the respondents that the YDPA has no discretion to refuse to assent in the first place as YDPA must act on the advice of the Prime Minister. Hence, on the proper construction of the amended provisions I find that that there is no removal of such assent, the consequence of which is simply that the question of whether the Royal Assent forms part of the basic structure does not arise. And as such, the ensuing argument that the amendments violate the basic structure would fall.

[140] I now turn to the language of the amended art 66(4) which still requires the YDPA to assent within a period of 30 days from when the Bill is presented but if it is not assented to, then cl (4A) of that article kicks in and the Bill shall become law 'in the like manner as if he had assented thereto'.

[141] The words 'as if he had assented thereto' appear to have taken away the power of assent. But again, if one looks at cl (4A) in the context of the Reid Commission Report and the Australian authorities on this aforementioned, Royal Assent is a part of the Legislative process. The overall effect of the amendments, as I see it, does not at all serve to remove the Royal Assent. Bills must still be presented to the YDPA under cl (4) for the purpose of the Royal Assent. The difference post-amendment is that if a Bill is not assented to, then the said Bill is taken to have been assented. Reading it this way, the law simply does for the YDPA what he himself ought to have done in the first place. It is one thing to say assent is not given. It is another thing entirely to say that assent is taken to be given. In this sense, the process and result are not different from what the appellant suggested ie having the YDPA advised to assent to a Bill. In whichever way we slice it, the net effect is that the Bill will become law.

[142] Based on the above, I find merit in the respondents' argument that there is no substantive change to the Legislative procedure which requires assent. The office of the YDPA is created by the Federal Constitution and thus is subject to constitutional restrictions that regulate his office, though he may enjoy certain prerogatives as his predecessors may have had enjoyed in what is now expressly enumerated in the Federal Constitution itself. When the office of the YDPA was formed through the provisions of the Constitution, it was also entrusted with the duty of assenting to all Bills.

[143] Further the position of YDPA is distinct from the position of the Malay Rulers who had a hand in drafting the Federal Constitution when Malaysia became an independent country. Their position is rooted in history. See *Phang Chin Hock v Public Prosecutor* [1980] 1 MLJ 70; [1979] 1 LNS 67.

[144] The sum of it all in my view is that art 66 is a constitutional manifestation of an ancient Westminster convention of requiring an assent of a Head of State, a role which befalls on the YDPA. Essentially, the will of the people must be paramount which is the heart and soul of our constitutional democracy. Article 66 is nothing more than a statutory reflection of a convention, imbedded now in our Federal Constitution.

[145] Therefore, a reasonable inference is that the insertion of art 66(4A) does not abrogate the involvement of the YDPA in the legislative process. In fact, it retained the involvement of the YDPA in such process as a constitutional monarch while also specifying the procedural limits in his exercise of constitutional right to expedite the passing of laws.

[146] Premised on the above, because, on a construction of art 66(4) and (4A) Royal Assent still remains a part of the legislative process, hence, the question as to the violation to the basic structure of the Constitution does not arise.

Issue (c) — Whether the NSCA 2016 is unconstitutional because it was enacted in breach of art 149 of the Federal Constitution?

[147] The position of appellant is simple and straightforward, and it is this. The NSCA 2016 is a security law and as such, the recital in the same must indicate that it was enacted pursuant to art 149 of the Federal Constitution. And since there is an omission, the NSCA 2016 is unconstitutional.

[148] The contention of learned senior federal counsel is also a simple and straightforward one and that is, the NSCA 2106 is not a legislation caught within the province of art 149(1) which explains why there is no referral to or mention of the aforesaid article in the NSCA 2106 itself. Learned SFC then referred to legislation which mentions art 149(1) like the Security Offences

(Special Measures) Act 2012 ('the SOSMA 2012') or the Prevention of Terrorism Act 2015 ('the POTA 2015'). A

[149] At this juncture, it would not be out of place to look at the source of power in which Parliament possesses in making law. That primary source is housed in art 74(1) of the Federal Constitution which provides: B

> Without prejudice to any power to make laws conferred on it by any other Article, Parliament may make laws with respect to any of the matters enumerated in the Federal List or the Concurrent List (that is to say, the First or Third List set out in the Ninth Schedule). C

[150] However, the aforesaid article is circumscribed by a sub-provision in art 74(3) which reads as follows:

> The power to make laws conferred by this Article is exercisable subject to any conditions or restrictions imposed with respect to any particular matter by this Constitution. D

[151] Reading cll (1) and (3) together, it can be seen quite clearly that the former when relied on to challenge the validity of any legislation concerns the 'competency' of Parliament. As for the latter, it is whether Parliament had passed legislation (which it had the power to do so) had contravened the 'conditions or restrictions imposed with respect to any particular matter' in the Federal Constitution. E

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[152] It is also quite clear that the matter before us is a challenge premised on cl (3) in that the NSCA 2016 did not comply with the prescribed conditions or restrictions imposed by the Constitution. This sort of constitutional challenge is usually described as an 'inconsistency' challenge. Such challenges as discussed earlier can be made directly in the High Court and if the learned judge sees fit, he or she can make a reference by way of questions stated to the Federal Court pursuant to art 128(2) of the Federal Constitution (see generally: arts 128(1)(a), 4(3) and (4) of the Federal Constitution and the decisions in *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112 and *Gin Poh*. This is what was done by the learned judge in this matter. G H

[153] Let us now look at art 149. There is little doubt that NSCA 2106 was enacted under Item 3 of the Federal List of the Ninth Schedule, which reads as follows: I

> 3. Internal security, including —
>
> (a) police; criminal investigation; registration of criminals; public order;
>
> (b) prisons; reformatories; remand homes; places of detention; probation of offenders; juvenile offenders;

A (c) preventive detention; restriction of residence:

(d) intelligence services; and

(e) national registration.

B **[154]** However, the validity of NSCA 2016, if it were an ordinary law would still be subject to Part II of the Federal Constitution ie the guarantor of fundamental liberties. More specifically art 5 forbids the deprivation of life and personal liberty; art 13 has the same effect on the deprivation property unless — the respective deprivations are done in accordance with law. In the same C way, arts 9 and 10 respectively guarantee the right to freedom of movement and the rights to free speech, assembly and association subject to reasonable restrictions Parliament may impose.

D **[155]** But if NSCA 2016 is found to be a law relating to subversion, no such restrictions are imposed as art 149(2) of the Federal Constitution provides that such law 'is valid notwithstanding that it is inconsistent with any of the provisions of Articles 5, 9, 10 or 13, or would apart from this article be outside the legislative power of Parliament'.

E

[156] This is where the rivalling contentions of the parties become relevant. If the appellant is correct that the NSCA 2016 is actually a law against subversion, then the condition the Federal Constitution attaches to it is found in art 149(1). That is, the Act must contain a recital in the form indicated in F paras (a)–(f) of art 149(1).

[157] Hence, if the NSCA 2016, upon statutory construction, is found to be a law against subversion, it will necessarily be in breach of art 149 because it does not contain the necessary recital. This lack of a recital the respondents G readily accept because they essentially argue that the NSCA 2016 is not a subversive law and is instead, an ordinary law relating to national security. I will now proceed to conduct the analysis.

H **[158]** The approach of the courts in dealing with such analysis can be found in the case of *Mamat bin Daud & Ors v Government of Malaysia* [1988] 1 MLJ 119, at p 123 where Azmi SCJ said this:

> *The object, purpose and design of the impugned section must therefore be investigated for the purpose of ascertaining the true character and substance of the legislation and the class of subject matter of legislation to which it really belongs.* But the court should not be concerned with the motives which induced the legislature to exercise its power, nor should the court be concerned with the draconian nature of the legislation or with the fact that it contravenes section 81 of the Penal Code *by creating penal offences without the requirement of mens rea.* (Emphasis added.)

I

[159] Abdoolcader SCJ who in the same case said as follows in His Lordship's dissenting judgment, at p 128:

> ... When a controversy arises whether a particular legislature is not exceeding its own and encroaching on the other's constitutional power, the court has to consider the real nature of the legislation impugned, its pith and substance, to see whether the subject dealt with is in the one legislative list or in the other.
>
> *When a legislature purports to enact legislation with reference to a particular head of legislative power, it has to comply with the conditions circumscribing that power. A nominal compliance with such conditions while the real attempt is to circumvent them would be regarded as a colourable exercise of the legislative power and will be struck down as unconstitutional.* (Emphasis added.)

[160] From the above, the court must look at 'its pith and substance, to see whether the subject dealt with is in the one legislative list or in the other'. Parliament may very well be competent to pass law relating to internal security and the NSCA 2016 may be geared towards that goal. However, the pivotal question is whether it is a law relating to national security which is also a law against subversion. In such a case, the condition in art 149 would come into play. What then amounts to subversion?

[161] Undefined in the Federal Constitution, one author describes laws against subversion, as opposed to ordinary national security laws, to mean as follows:

> ... in its ordinary meaning, 'subversion' can be understood as 'a systematic attempt to overthrow or undermine a government or political system by persons working secretly from within'. It connotes attempts to damage or destroy an established system or government, often though not always by covert means. A state of emergency, on the other hand, connotes an exceptional situation where a government or public authority is empowered due to extraordinary circumstances presenting an urgent threat to the existing order — to apply special measures that it would not otherwise be permitted to use, in order to confront these circumstances. (Emphasis added.)

(See: Wilson Tay Tze Vern, *Subversion and Emergency Powers* [2019] 4 MLJ lxxiii, at pages lxxiv–lxiv).

[162] These very indicators of subversive or anti-security notions are encapsulated within limbs (a)–(f) of art 149(1) of the Federal Constitution, which limbs read as follows:

> (a) to cause, or to cause a substantial number of citizens to fear, organized violence against persons or property; or
>
> (b) to excite disaffection against the Yang di-Pertuan Agong or any Government in the Federation; or

A (c) to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence; or

(d) to procure the alteration, otherwise than by lawful means, of anything by law established; or

B (e) which is prejudicial to the maintenance or the functioning of any supply or service to the public or any class of the public in the Federation or any part thereof; or

(f) which is prejudicial to public order in, or the security of, the Federation or any part thereof ...

C

[163] As mentioned earlier, laws passed under the auspices of art 149(1) include the SOSMA 2012 and the POTA 2015. An examination of the Preamble of the SOSMA 2012, for instance, indicates that it possesses a recital D specifically catered to art 149(1). Its recital reads as follows:

WHEREAS action has been taken and further action is threatened by a substantial body of persons both inside and outside Malaysia —

(1) to cause, or to cause a substantial number of citizens to fear, organized violence against persons or property;

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(2) to excite disaffection against the Yang di-Pertuan Agong;

(3) which is prejudicial to public order in, or the security of, the Federation or any part thereof,· or

F (4) to procure the alteration, otherwise than by lawful means, of anything by law established;

AND WHEREAS Parliament considers it necessary to stop such action;

NOW, THEREFORE, pursuant to Article 149 of the Federal Constitution IT IS G ENACTED by the Parliament of Malaysia as follows ...

[164] Another example of a law against subversion and organised crime and violence is the Dangerous Drugs (Special Preventive Measures) Act 1985 ('the DDSPA 1985'). It also contains a specific art 149(1) recital.

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[165] In both the POTA 2015 and the DDASPA 1985, special national security-related bodies are set up tasked to deal with specific preventive detention measures and other national security related issues set up by those respective statutes. And even if they do not establish any specific statutory I bodies, like the SOSMA 2012, they contain special procedures more severe than those contained in the Criminal Procedure Code ('the CPC').

[166] The NSCA 2016 does something similar to the POTA 2015 and DDSPA 1985 in that it establishes the National Security Council which is the second respondent in this case. The second respondent has very astute and targeted powers relating to national security as circumscribed by s 3 of the NSCA 2016.

[167] The functions of the second respondent are spelt out in s 4 of the NSCA 2016. They are as follows:

> 4 The Council shall have the following functions:
>
> (a) to formulate policies and strategic measures on national security, including sovereignty, territorial sovereignty, defence, socio-political stability, economic stability, strategic resources, national unity and other interests relating to national security;
>
> (b) to monitor the implementation of the policies and strategic measures on national security;
>
> (c) to advise on the declaration of security areas; and
>
> (d) to perform any other functions relating to national security for the proper implementation of this Act.

[168] One can easily glean from s 4 that 'national security' pervades the whole of the section in that it mandates the second respondent, the National Security Council, to function in the name of 'national security'. This very much resembles sub-cl (f) of art 149(1) of the Federal Constitution. A similar enumeration of powers of the Director General of National Security in s 16 of the NSCA 2016 arrives me at the same conclusion.

[169] But perhaps the most glaring feature of the NSCA 2016 is s 18(1) thereof which reads as follows:

> (1) Where the Council advises the Prime Minister that the security in any area in Malaysia is seriously disturbed or threatened by any person, matter or thing which causes or is likely to cause serious harm to the people, serious harm to the territories, economy, national key infrastructure of Malaysia or any other interest of Malaysia, and requires immediate national response, the Prime Minister may, if he considers it to be necessary in the interest of national security, declare in writing the area as a security area.

[170] The effect of a declaration of 'security area' under s 18(1) of the NSCA 2016 is manifold. Under s 22, the government, through the Director of Operations is empowered to evacuate any person from such an area. The full extent of s 22 will be addressed later in this judgment.

[171] Under s 23, the Director of Operations is empowered to impose curfews

and thereby order any person to remain confined indoors for a period of time to be determined by him.

[172] Under s 24 of the NSCA 2016, the Director of Operations may do any of the following, in his own discretion:

> (a) to control the movement of any person or any vehicle, vessel, aircraft or conveyance in and out of the security area, including to direct to leave the security area and to refuse entry into the security area;
>
> (b) to control or prohibit the use of any road or water-way in, or air space above, any security area by any person or any vehicle, vessel, aircraft or conveyance; or
>
> (c) to close any road or water-way in the security area.

[173] The above powers are plainly overreaching to say the least. Further, under ss 25–26 of the NSCA 2016, it would appear that any person caught in a 'security area' will no longer be subject to the Criminal Procedure Code.

[174] For instance, s 25 no longer makes any distinction between seizable or non-seizable offences. In a 'security area', any person is subject to arrest without a warrant. Under s 26, any person from the Security Forces is similarly empowered to conduct a search of seizure of any vehicle of or any premises without the need for a warrant. This is apparent from the very language of s 26 itself, which reads as follows:

> 26 (1) Any member of the Security Forces may, without warrant and with or without assistance, stop and search any individual, vehicle, vessel, aircraft or conveyance in the security area if he suspects that any article or thing being evidence of the commission of an offence against any written Jaw is likely to be found on the individual or in the vehicle, vessel, aircraft or conveyance, and may seize any arlicle or thing so found.
>
> (2) Any member of the Security Forces may, without warrant, enter and search any premises or place if he suspects that any article of thing being evidence of the commission of an offence against any written law is likely to be found on the premises or place, and may seize any arlicle or thing so found.

[175] And, as if ss 25 and 26 were not draconian enough, s 24 of the NSCA 2016 expressly enables the Security Forces to control and restrict movement within, into and out of a 'security area' as they see fit.

[176] It is thus patently clear that the pith and substance of the NSCA 2016 by a very cursory but clear reading of its salient provisions indicate that it relates, at the very least, to the subject-matter of art 149(1)(f) of the Federal Constitution. The entire NSCA 2016 is full of references to national security and with measures addressed to curb any incursions into or threats to it. One

hardly need to read too deeply into the NSCA 2016's pith and substance to determine its true nature as being a very severe law against the very subject of art 149 of the Federal Constitution, namely: special powers against subversion, organised violence and acts and crimes prejudicial to the public.

[177] In fact, the vast bulk of powers indicated are very reminiscent of the Emergency Powers strictly and only conferred upon the YDPA under art 150 of the Federal Constitution. It can be reasonably said that the aforementioned salient provisions of the NSCA 2016 could be a subtle or not so subtle attempt to circumvent the YDPA and instead allows the National Security Council (and therefore the Prime Minister) to himself declare a State of Emergency.

[178] From the above analysis, there can be only one reasonable conclusion or finding and that is the NSCA 2016 is a law against subversion envisaged by Part XI of the Federal Constitution, specifically art 149(1) thereof. It therefore should have been passed under that article. And since it was not stated that it was enacted pursuant to art 149(1) in the preamble, NSCA 2016 is unconstitutional as submitted by the learned counsel of the appellant.

Issue (d) — Whether the NSCA 2016 is unconstitutional because it violates freedom of movement under art 9(2) of the Federal Constitution?

[179] While I have already determined that the NSCA 2016 is unconstitutional on the ground it was not enacted pursuant to art 149 of the Federal Constitution, I will still proceed to examine whether the same is violative of art 9(2). As I have stated earlier in this judgment, if a law is passed under art 149 of the Federal Constitution, it would no longer be subject to art 9. Regardless, the question still remains whether if the NSCA 2016 could have been passed as a non-art 49 law, would it nonetheless meet the standards of art 9.

The doctrine of proportionality

[180] This issue is premised on the doctrine of proportionality which has now fully entrenched by the most recent pronouncement of this court in *Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 4 MLJ 1 ('Alma Nudol').

[181] The primary issue in the *Alma Nudo* case was whether s 37A of the Dangerous Drugs Act 1952 was unconstitutional on the grounds that it was a disproportionate incursion into the accused right to a fair trial, guaranteed under art 5(1) of the Federal Constitution — which right encompasses the right to be presumed innocent.

[182] Section 37A permitted the use of 'double presumptions' where it allowed the court to presume trafficking upon invoking the presumption of possession. Hence the prosecution was only required to prove beyond reasonable doubt the basic facts of 'custody and control' to invoke the presumption of possession and with that presumption the court then was entitled to invoke the presumption of trafficking. This court found that this offended the concept of proportionality in that trafficking of drugs carried the mandatory sentence of death and the double presumption placed the entire legal burden of exculpation on the accused, rendering the whole process oppressive in nature to say the least. Thus, the prosecution now are required to prove beyond reasonable doubt the factum of trafficking in order to sustain a conviction of trafficking.

[183] *Alma Nudo* sets out three factors to determine proportionality, at para 127(d) of the judgment, as follows:

> (i) there must be a sufficiently important objective to justify in limiting the right in question;
>
> (ii) the measure designed must have a rational nexus with the objective; and
>
> (iii) the measure used which infringes the right asserted must be proportionate to the objective ...

[184] In *Alma Nudo* this court had premised their reasoning on the overarching effect of art 8(1) of the Federal Constitution which provides as follows:

> All persons are equal before the law and entitled to the equal protection of the law.

[185] The concept of proportionality has accordingly been read into very fabric of art 8(1) to mean that all laws which infringe fundamental rights must not only be objectively fair and possess a legitimate aim, but that such laws must also be a proportionate incursion into the fundamental rights of the subject. It should be noted however that the *Alma Nudo* case was a decision made by reference to arts 5(1) and 8(1) of the Federal Constitution. In fact, the prime article in question was art 5(1). In the case before us, the relevant article is art 9(2) of the Federal Constitution which provides as follows:

> Subject to Clause (3) and to any law relating to the security of the Federation or any part thereof, *public order, public health, or the punishment of offenders*, every citizen has the right to move freely throughout the Federation and to reside in any part thereof.

[186] One can immediately see the difference in the language used in arts 9(2) and 5(1). Article 5(1) guarantees the rights to life and personal liberty 'save in accordance with law' and of course what is 'law' provides fertile ground for the court to pontificate. However, art 9(2), and indeed art 10(2) permit

derogations from the rights they guarantee subject to certain specific limitations which those articles themselves enumerate. A

[187] With this difference in language, can we still utilise art 8(1) of the Federal Constitution to apply the concept of proportionality into art 9(2) as it was done to art 5(1) in *Alma Nudo*? B

[188] This issue was canvassed by this court in *Public Prosecutor v Azmi bin Sharom* [2015] 6 MLJ 751 ('Azmi bin Sharom') which concerned a constitutional challenge to certain provisions of the Sedition Act 1948 vis a vis the freedoms enshrined by art 10(1) of the Federal Constitution. The argument appeared to be that the doctrine of proportionality did not apply to the right to free speech by virtue of the difference in language between art 10 of the Malaysian Federal Constitution and the relevant article of its Indian counterpart. Article 19(2) of the Indian Constitution expressly enables the Indian Parliament to impose such 'reasonable' restrictions on the relevant right. (See *Romesh Thappar v The State of Madras* 1950 SCR 594 ; *Chintaman Rao v The State of Madhya Pradesh* 1950 SCR 759). C D

[189] Prior to *Azmi bin Sharom*, this court had held in *Sivarasa* that the word 'reasonable' ought to be read into our art 10(2). Thus, the court had to satisfy itself that any derogation from art 10 rights is indeed reasonable. It was this decision that the relevant party urged this court to depart from in *Azmi bin Sharom.* E

F

[190] This court agreed with our Supreme Court's decision in *Public Prosecutor v Pung Chen Choon* [1994] 1 MLJ 566 at p 576 that it was not for the Courts to decide whether any restriction imposed by Parliament under art 10(2) was 'reasonable' or not. However, the Federal Court, upon referring to the relevant case law, essentially agreed that art 8(1) qualified art 10(2) much in the way it does art 5(1). This is what Arifin Zakaria CJ, in *Azmi bin Sharom* held at para 43: G

> In this regard, we agree with the learned judge in Sivarasa Rasiah, that the restriction that may be imposed by the Legislature under art 10(2) is not without limit. *This means to say that the law promulgated under art 10(2) must pass the proportionality test in order to be valid.* This, in our view is in line with the test laid down in *Pung Chen Choon* discussed earlier. Having said that, we will now consider whether s 4(1) of the Act would pass the proportionality test. (Emphasis added.) H

[191] Thus, even if the 'reasonableness' no longer applies, in determining the validity of laws purporting to restrict art 10(1) rights, they must still pass the test of proportionality. I

[192] Article 10(2)(b) provides as follows:

(2) Parliament may by law impose —

...

(b) on the right conferred by paragraph (b) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof or public order ...

[193] Restrictions on art 10(2)(b) are therefore subject to the specific discretion of Parliament to impose restrictions 'in the interest of the security of the Federation or any pan thereof or public order'. These restrictions can be said to be similar to the limitations provided for in art 9(2).

[194] The law as it stands now to me is quite clear. The concept of proportionality is very part of the legal landscape of this country and for good reason. Proportionality acts as a check and balance of the power of Parliament such that it does step over constitutionally permissible limits. This is in accord with the principle of constitutional supremacy practised in this country as opposed to parliamentary supremacy.

[195] Hence, art 9(2) permits Parliament the latitude to restrict freedom of movement on any of the grounds mentioned therein but, Parliament must nonetheless ensure that such restrictions are proportionate to a legitimate legislative aim. Parliament is thus duty-bound to adequately balance the interests of the State with the interests of the public.

[196] With that, I will now proceed to determine whether NSCA 2016 offends the concept of proportionality. To recapitulate, there is little doubt in my mind that the first two elements of the assessment of proportionality mentioned earlier have been met in that s 22 of the NSCA 2016 and s 18 of the same (which is very much related to s 22): (i) has a sufficiently important objective to justify the restriction of the freedom of movement; and (ii) that the measure designed by Parliament has a rational nexus with the objective it intended to meet.

[197] The third element, that is, whether the measures employed in s 22 of the NSCA 2016 are proportionate to the objective it sought to achieve ie the legitimate objective of preserving national security requires a detailed analysis by this court. In performing this task, I am constrained to refer to persuasive international human rights jurisprudence as there is a dearth of authority in this part of the world.

[198] As with most matters in the realm of human rights law, the first port of call so to speak is the European Courts of Human Rights where we have on occasion relied on their judgments as a point of reference. Reliance had also

been made to the jurisprudence relating to the International Covenants of Human Rights ('ICCPR') and other such international instruments. See generally: *Public Prosecutor v Gan Boon Aun* [2017] 3 MLJ 12.

[199] I am fully aware of the caveat in para 126 in the judgment of this court in *Alma Nudo* that the development of the concept of proportionality is better attributed to Malaysian common law developments on a prismatic reading of art 8(1) of the Federal Constitution and not international human rights jurisprudence. That said, I see no impediment making reference to developments in international human rights jurisprudence to ensure that our own art 8(1) is interpreted as prismatically and as purposively as possible as was done in *Alma Nudo.*

[200] My research on this subject of proportionality brings me to art 12 of the ICCPR, cll (1) and (3) of which bear similarity to our art 9(2). Those clauses of the ICCPR read as follows:

> 1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
>
> 3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, *are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others,* and are consistent with the other rights recognized in the present Covenant. (Emphasis added.)

[201] The Human Rights Committee ('HRC'), a body tasked to interpret the provisions of the ICCPR, in its General Comment No 27 (2 November 1999), at para 14 said this:

> Article 12, paragraph 3, clearly indicates that it is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them. Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; *they must be the least intrusive instrument amongst those which might achieve the desired result;* and they must be proportionate to the interest to be protected. (Emphasis added.)

[202] On the point of 'least intrusive' or 'least restrictive' measures, the Human Rights Council observed as follows:

> To conform to the principle of proportionality, any restriction must be appropriate to achieve its protective function. To meet the necessity requirement it must also be the least intrusive instrument among those which might achieve the desired result. It must be narrowly tailored to the specific aims and concerns of the authorities, and take into account an analysis of the full range of rights involved in the proposed assembly. *In determining the least intrusive instrument to achieve the desired result, authorities should consider a range of measures, with prohibition a last resort. To this end, blanket bans, including bans on the exercise of the right entirely or on any exercise of the right in specific places or at particular times, are intrinsically disproportionate,*

> *because they preclude consideration of the specific circumstances of each proposed assembly (see A/HRC/23/39, para 63).* (Emphasis added.)

(See: Human Rights Council, 'Joint Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association and the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on The Proper Management of Assemblies' (AIHRC/31/66) (4 February 2016), at para 30).

[203] As to what 'least intrusive' mean, guidance can be gathered from a decision of the ECHR in *Soltysyak v Russia* Application No 4663/05 (10 February 2011). The facts were shortly these.

[204] The applicant, a Russian citizen, had served for 21-years, as a Russian military officer. During his service, he was exposed to highly confidential material and information relating to rocket test launches and the relevant military unit responsible. Upon retirement from the military service, the Russian Government revoked his travel documents on the grounds that he was still privy to highly confidential information and that his travels may expose him and thus the Russian State to serious harm should such information be publicly revealed.

[205] The applicant argued that the travel restriction imposed on him was in breach of his freedom of movement guaranteed him by article 2 of Protocol No 4 of the European Convention of Human Rights. The ECHR agreed with him. This is what the court observed at paras 51–53 of its judgment:

> ... Russia did not enter any reservation to Article 2 of Protocol No. 4 when ratifying the Convention. Having regard to the established common European and international standard, the Court considers that the Russian Government were under an obligation to provide a particularly compelling justification for maintaining the restriction in question.
>
> The Court reiterates that, as in the Bartik case, the confidential information which the applicant possessed could be transmitted in a variety of ways which did not require his presence abroad or even direct physical contact with anyone. The Government's claim that the applicant would be abducted by foreign intelligence services or terrorist organisations while abroad appears to be mere conjecture *not supported by any actual assessment of the security risks in the applicant's individual case because of the blanket nature of the prohibition on private international travel in respect of all those who, like the applicant, had had access to State secrets in the past.*
>
> The applicant's status as a military serviceman or the fact that he acknowledged the possibility of a restriction in 1999 do not alter the conclusion that the restriction failed to achieve the protective function that had been previously assigned to it. Even though the Court has previously accepted that the rights of military personnel may, in certain circumstances, be restricted to a greater degree than would be permissible in the case of civilians ..., such *a restriction must in all cases be commensurate with its protective function. However, as noted above, there does not*

appear to have been a reasonable relationship of proportionality between the means employed and the aim pursued. (Emphasis added.)

[206] The above case is a perfect example of how blanket exercise of power, even if for noble and legitimate aims, may run foul of the doctrine of proportionality. Again, I must add that reference to the above case and other international jurisprudence is merely to assist in the development of our own constitutional principles of common law relating to the doctrine of proportionality. As I have already said, the principle of proportionality is well entrenched in our art 8(1) of the Federal Constitution. Reference to such cases is merely an attempt to surface the full extent of the guarantees contained in Part II of our Federal Constitution.

Whether s 22 of the NSCA 2016 and other related sections, namely s 18, disproportionately restricts freedom of movement guaranteed by art 9(2) of the Federal Constitution

[207] With the aforementioned analysis foremost in my mind, I will now proceed to examine whether s 22 of the NSCA 2016 and other related sections, namely s 18, is a proportionate measure in relation to the legitimate aims of art 9(2), more specifically the aim relating generally to 'public order'.

[208] Section 22 of the NSCA 2016, which was referenced in the earlier portion of this judgment provides as follows:

22 Exclusion and evacuation of persons

(1) The Director of Operations may, by order in writing, exclude any person from the security area or any part of the security area for a period as specified in the order.

(2) The Director of Operations may, by order in writing, evacuate any person or group of persons from the security area or any part of the security area, and resettle such person or group of persons to an area as determined by the Director of Operations.

(3) Any person who fails to comply with the order under subsection (1) or (2) commits an offence and shall, on conviction, be liable to a fine not exceeding five thousand ringgit or to imprisonment for term not exceeding three years or to both. (Emphasis added.)

[209] It is quite clear that s 22 is an incursion on the freedom of movement guaranteed in art 9(2). The question which arises is whether it is a proportionate incursion?

[210] Section 22 must be read with s 18(1) as it relates to the sole discretion conferred to the Prime Minister to declare an area as a 'security area'. The

powers available to the Director of Operations under s 22 are contingent upon the Prime Minister declaring and designating a given area as a 'security area'.

[211] The first notable feature of s 22 read with s 18 is that there is no indication in the whole of the NSCA 2016 on what exactly comprises a 'security area', how large such an area may be declared, and for how long such a declaration may persist. It was earlier observed that the declaration of a 'security area' and the general power conferred on the Security Forces and the second respondent are so wide and invasive that there no longer seems to be any distinction between such a declaration and a Proclamation of Emergency. In short, the NSCA 2016 practically empowers the Prime Minister to bypass the YDPA to proclaim for himself a State of Emergency.

[212] Once a security area is declared, s 22 not only empowers the Director of Operations to restrict or exclude someone from the 'security area', but it also empowers him to re-settle such person or persons to some other area he deems fit. The NSCA 2016 provides no criteria whatsoever on where exactly such persons may be re-settled and for how long. So, assuming therefore that the Prime Minister decides to declare an entire State as a 'security area', the Director of Operations has the theoretical and absurd power to evacuate and re-settle any number of persons from that State arguably even to some other State. Surely, nothing in the NSCA 2016 leads to me to a more palatable or re-assuring conclusion.

[213] By way of reference, I also had recourse to s 51 of the now repealed Internal Security Act 1960 ('the ISA 1960'). It provides as follows:

> 51 Exclusion of persons
>
> The Officer in Charge of a Police District may by order in writing exclude any person from the Police District under his charge or from any part thereof, the District or part being part of a security area.

[214] It will be observed that the ISA 1960 also had a provision not too different from s 18 of the NSCA 2016 in relation to a declaration of 'security area'. That said, the differences are stark.

[215] For one, s 47 of the ISA 1960 enabled the YDPA and not the Prime Minister the power to declare a 'security area'. Admittedly, there is no restriction on time and span of such an area. However, by way of comparison, the key difference is that s 51 of the ISA 1960 only permitted the OCPD to exclude persons, maximally, in the District under his charge. Section 22 of the NSCA 2016 is obviously larger and much more pervasive spanning the whole of the 'security area' wherever or howsoever large it may be.

[216] Secondly, s 51 of the ISA 1960 did not contain any provision on re-settlement. It is one thing to enable evacuees the option to voluntarily place themselves in a place of refuge, it is another thing entirely for them to be forcibly evacuated and later re-settled where the Director of Operations may deem fit. One understands the need to evacuate persons from certain locations during crises. However, one can hardly see the legitimate aim to restrict the residence of another person to some other area that the State may deem fit. More so, when the failure to abide by such order of re-settlement carries penal sanction in fine, imprisonment or both, in s 22(3).

[217] Assessing s 22 of the NSCA 2016 as a whole, and coupled by the fact that it is very reminisce of powers unique to a State of Emergency, one can hardly appreciate s 22 as being necessary or proportionate to any aim targeted to preserve 'public order' much less. can it be considered the least intrusive or less restrictive measure. The powers are so comprehensive that they border on being callous. I cannot therefore bring myself to agree with the respondents that there is at all any fair and objective balance in favour of the interests of the State as compared to the interests of the public.

[218] Further, s 22 of the NSCA 2016 is so inextricably linked to s 18 of the NSCA that it is hardly possible to sever the two. The nub of the entire Act actually stems from s 18 by the power conferred on the Prime Minister to declare a 'security area'. These powers are very pervasive and know no bounds or limits. Section 18 itself is, for the same reasons adumbrated disproportionate to art 9(2) of the Federal Constitution. I also analysed many of the other key provisions in issue (c) above what other powers are conferred on the Security Forces once a 'security area' is declared. Thus, because s 18 is essentially an anchor provision, having declared that it is unconstitutional not only renders s 22 unconstitutional as well, but all the other provisions which flow from s 18 (as mentioned earlier).

[219] With ss 18 and 22 of the NSCA 2016 being unconstitutional, the rest of the NSCA 2016 merely become redundant and the Act a hollow shell. It therefore leads to one conclusion that the entire NSCA 2016 is indeed unconstitutional by virtue of the entire regime and structure of it being disproportionate to art 9(2) of the Federal Constitution. In the result, I am constrained to answer the constitutional question in issue (d) in the affirmative, that is: whether the NSCA 2016 is a disproportionate intrusion on the right to freedom of movement guaranteed by art 9(2) of the Federal Constitution, and thereby unconstitutional.

CONCLUSION

[220] At the hearing of this case, this court effectively asked parties the question whether it possesses the jurisdiction to hear the present dispute. For the reasons I have already provided at length, this court does indeed possess jurisdiction by virtue of art 128(2) of the Federal Constitution, ss 84–85 of the CJA 1964, and is thus constitutionally obligated to answer the constitutional issues posed herein.

[221] As for the constitutional issues, they may be restated with my corresponding answers, as follows:

(a) whether the following provisions of written law are unconstitutional, null and void, and of no effect:

(i) s 12 of Act A566;

(ii) s 2 of Act A584; and

(iii) s 8 of Act A885

on the ground that they violate the basic structure of the Federal Constitution.

Answer: *Negative*. For clarity, the issue of violation of the basic structure does not arise because Royal Assent is a part of and still remains a part of the legislative process.

(b) whether the NSCA 2016 is unconstitutional, null and void, and of no effect because it was not enacted in accordance with art 149 of the Federal Constitution.

Answer: *Affirmative*.

(c) whether the NSCA 2016 is unconstitutional, null and void, and of no effect because it violates the freedom of movement guaranteed by art 9(2) of the Federal Constitution.

Answer: *Affirmative*.

[222] Thus, based on the foregoing analysis and answers to the constitutional questions, I hereby direct that the present matter be remitted to the High Court for the final disposal of the OS in accordance with this judgment. It is thus for the High Court to make the appropriate orders and to grant the necessary relief.

[223] Submissions on the costs of the proceedings at this court will also be determined by the High Court in accordance with s 83 of the CJA 1964.

Nallini Pathmanathan FCJ (delivering majority judgment):

INTRODUCTION

[224] This is a special case referred to the Federal Court from the High Court pursuant to s 84 of the Courts of Judicature Act ('the CJA').

[225] My learned brothers Azahar Mohamed CJM and Zawawi Salleh, Abang Iskandar Abang Hashim, Idrus Harun FCJJ have read this judgment in draft and expressed their agreement for it to be the majority judgment of the court.

BACKGROUND

[226] The parties will be referred to as they were in the High Court. The plaintiff filed an originating summons in the High Court seeking the following relief:

(a) a declaration that s 12 of the Constitution (Amendment) Act 1983, s 2 of the Constitution (Amendment) Act 1984, and s 8 of the Constitution (Amendment) Act 1994 ('the Amending Provisions') are unconstitutional, null and void, and of no effect;

(b) a consequential declaration that arts 66(4) and (4A) of the Federal Constitution ('the FC') are unconstitutional;

(c) a declaration that the National Security Council Act 2016 ('the NSCA') is unconstitutional; and

(d) an injunction to restrain the National Security Council from taking any steps or acting on the NSCA.

[227] At the High Court, the parties agreed for constitutional questions to be referred to the Federal Court for determination under s 84 of the CJA. On 14 March 2019, the learned High Court judge referred the following two constitutional questions to this court by way of a special case pursuant to s 84 of the CJA:

(a) whether the amending provisions are unconstitutional, null and void and of no effect on the ground that they violate the basic structure of the FC; and

(b) whether the NSCA is unconstitutional, null and void and of no effect on the following grounds:

(i) it became law pursuant to unconstitutional amendments;

(ii) it was not enacted in accordance with art 149 of the FC; and

(iii) it violates the freedom of movement guaranteed by art 9(2) of the

A FC.

[228] This case calls for a proper understanding of the role of the Federal Court in our constitutional framework. While a comprehensive study on models of constitutional adjudication is beyond the scope of this judgment, it is necessary to begin with a basic understanding of the system adopted in Malaysia.

B

MODELS OF CONSTITUTIONAL REVIEW OF LEGISLATION

C

[229] The forms of constitutional review of legislation can be broadly classified into two main models: the continental European model of review by a specialised constitutional court, and the American or common law model of review by ordinary courts.

D

[230] In the European model, influenced by the jurisprudence of Hans Kelsen, constitutional review of the validity of legislation is generally:

(a) centralised, in that the review is conducted only by a specialised constitutional court; and

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(b) abstract, in that the constitutionality of a law is reviewed in the abstract without reference to a factual context. The review is usually conducted principaliter, ie in an action where the principal or only issue is the constitutionality of the law.

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[231] This model can be seen in European states such as Austria, Germany, France, and Spain. A particular feature of this model of abstract review is that a constitutional court often has power to review the constitutionality of a law before it comes into effect. Typically, a group of members of Parliament can challenge the constitutionality of a law — one that they have unsuccessfully opposed in the Legislature — before the constitutional court, which is empowered to strike it down prior to its actual promulgation.

G

H **[232]** In contrast, in the US model, constitutional review of legislation is generally:

(a) decentralised, in that all ordinary courts of general jurisdiction have the power to determine whether a law is unconstitutional, and the apex court in the hierarchy is only the final court of appeal; and

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(b) concrete, in that the review is conducted in the context of the facts and circumstances of the case litigated before the court, and is usually incidental to the making of a judicial decision as to which party wins the case.

[233] This model was prominently developed in the US and adopted in countries which formerly formed part of the British empire. Examples can be seen across common law Commonwealth jurisdictions, including Australia, Canada, India, and Malaysia.

(AHY Chen, MP Maduro, 'The Judiciary and Constitutional Review' in M Tushnet, T Fleiner, C Saunders (eds) *Routledge Handbook of Constitutional Law* (London and New York: Routledge, 2013) at 97–99; A Harding, 'The Fundamentals of Constitutional Courts' (Myanmar: International Institute for Democracy and Electoral Assistance, 2017) at 1–3; M Rosenfeld, 'Constitutional Adjudication in Europe and the United States: paradoxes and contrasts', *International Journal of Constitutional Law*, Vol 2 No 4 (OUP and New York University School of Law, 2004) at 633–634.)

[234] Two important consequences flow from what we may term the common law model of decentralised, concrete review in Malaysia. First, constitutional questions can and should normally be determined by the High Courts at first instance. The role of the Federal Court in constitutional adjudication is only as a court of final appeal or last resort; its jurisdiction to determine matters at first instance is limited and strictly construed. Second, as a general rule, constitutional review of legislation cannot be triggered in the absence of a concrete controversy. A real and actual controversy constitutes the basis for the review.

[235] These two points will be elaborated in turn.

DECENTRALISED REVIEW

Jurisdiction of the Federal Court

[236] The general scheme of the FC is to empower *all* courts to interpret the constitution (*Gin Poh Holdings Sdn Bhd (in voluntary liquidation) v The Government of the State of Penang & Ors* [2018] 3 MLJ 417 at [35]–[36]). The power to interpret constitutional provisions is not exclusive to the Federal Court. 'The Federal Court is not a constitutional court, but as the final court of appeal on all questions of law, is the final arbiter on the meaning of constitutional provisions' (A Harding, *Law, Government and the Constitution in Malaysia* (Kuala Lumpur: Malayan Law Journal, 1996) at p 138).

[237] The jurisdiction of the Federal Court is of four kinds: appellate jurisdiction, original jurisdiction under art 128(1) of the FC, referral jurisdiction under art 128(2), and advisory jurisdiction under art 130 (*Assa Singh v Mentri Besar, Johore* [1969] 2 MLJ 30 at p 36; *Kulasingam v Public Prosecutor* [1978] 2 MLJ 243 at p 244). The exclusive original jurisdiction of the Federal Court is confined only to Federal-State disputes, disputes between

states, and cases where the validity of a law is challenged on the ground that Parliament or a State Legislative Assembly had legislated on a matter on which it had no power to make laws. All other questions of constitutionality are within the jurisdiction of the High Court (*Gin Poh Holdings Sdn Bhd* at [36]).

[238] The limits of the exclusive original jurisdiction of the Federal Court are strictly construed. This is to preserve the role of the Federal Court as a final court of appeal on constitutional issues; 'to extend the exclusive original jurisdiction of the Federal Court to matters which are not expressly provided by the Constitution would apart from anything else, deprive aggrieved litigants of their right of appeal to the highest court in the land' (*Rethana v Government Of Malaysia* [1984] 2 MLJ 52 at p 54).

[239] Under the constitutional scheme, therefore, the Federal Court is generally a court of last resort for all constitutional questions. It is only in a narrow category of exceptional cases — those expressly stipulated in art 128(1) of the FC — that such questions must be determined by the Federal Court at first instance.

History of s 84 of the CJA

[240] The constitutional role of the Federal Court is reflected in the wording and application of s 84 of the CJA. The referral jurisdiction of the Federal Court is provided under art 128(2) of the FC:

> Without prejudice to any appellate jurisdiction of the Federal Court, where in any proceedings before another court a question arises as to the effect of any provision of this Constitution, the Federal Court shall have jurisdiction (subject to any rules of court regulating the exercise of that jurisdiction) to determine the question and remit the case to the other court to be disposed of in accordance with the determination.

[241] The original form of the present s 84, which provides for the reference of constitutional questions by the High Court, was found in s 48 of the CJA. Before amendment, s 48(1) initially read:

> Where in any proceedings in any High Court a question arises as to the effect of any provision of the Constitution, the Judge hearing such proceeding *shall* stay the same on such terms as may be just to await the decision of such question by the Federal Court. (Emphasis added.)

[242] The original mandatory language of s 48 was inconsistent with the constitutional scheme (*Gerald Fernandez v Attorney-General, Malaysia* [1970] 1 MLJ 262 at p 264), in that it deprived the High Court of power to decide constitutional questions arising in proceedings before it (Parliamentary

Hansard, 16 October 1964). Thus, the CJA was swiftly amended in 1964 itself by substituting the word 'shall' (underlined above) with 'may'. The purpose of the amendment was to ensure conformity with the constitutional scheme, and to avoid any impression that s 48 had the 'effect of extending the exclusive jurisdiction of the Federal Court to decide constitutional questions beyond the limits on that exclusive jurisdiction prescribed by the Constitution' (explanatory statement to the Courts of Judicature (Amendment) Bill 1964).

[243] The effect of the amendment made it clear that there is no obligation on the part of the High Court to refer any constitutional question arising before it to the Federal Court; it may itself dispose of the question (*Hashim bin Saud v Yahaya bin Hashim & Anor* [1973] 2 MLJ 85 at p 85; M Suffian bin Hashim, *An Introduction to the Constitution of Malaysia* (Kuala Lumpur: Jabatan Chetak Kerajaan, 1972) at p 86).

[244] In fact, 'the Federal Court has been at pains to point out that, although constitutional issues can be referred to it by lower court, decided and then remitted to the lower court, the lower courts should decide issues of constitutionality themselves in the first instance' (Harding at 138). The point was emphatically made by Suffian LP in *Mark Koding v Public Prosecutor* [1982] 2 MLJ 120 at pp 123–124:

> [I]t would have been better if the learned Judge had not referred this matter to us but instead had himself decided the constitutional questions which arose (he had jurisdiction to do so: *Fernandez v Attorney-General* [1970] 1 MLJ 262, 264) and decided the case one way or the other. If he had done that and there were an appeal to us, the whole matter would have been disposed of in two steps. By referring this matter to us without deciding it one way or another, should there be an appeal from his decision on the charge, this matter would come back to us a second time, and thus will have to be disposed of in four steps: causing delay and additional expense, instead of helping in the words of s 48(2) of the Courts of Judicature Act, towards the speedy and economical final determination of these proceedings.

[245] Thus the drafters of the FC and CJA envisaged that the reference jurisdiction under (now) s 84 of the CJA was not to be exercised automatically or invariably in every case. The High Court should generally and ordinarily determine constitutional questions at first instance, barring those within the original jurisdiction of the Federal Court. Not all cases should be referred to the Federal Court for determination. It is implicit in the constitutional and statutory scheme that the 'special cases' suitable to be referred to and determined by the Federal Court must necessarily be subject to certain conditions.

[246] Section 84 of the CJA does not expressly indicate the factors to be considered in determining whether a case is suitable to be referred to and

A determined by the Federal Court. Where the statute conferring a jurisdiction or discretion is silent as to how precisely it must be exercised, It is well-established that the court has the power to develop common law principles to guide the exercise of its discretion.

B *Powers of the Federal Court in hearing s 84 reference*

[247] Section 84 of the CJA as it presently stands reads as follows:

> 84 Reference of constitutional question by High Court
>
> C (1) Where in any proceedings in any High Court a question arises as to the effect of any provision of the Constitution, the Judge hearing such proceeding may stay the same on such terms as may be just to await the decision of such question by the Federal Court.
>
> D (2) An order staying proceedings under this section may be made by the Judge of his own motion or on the application of any party and shall be made at such stage of the proceedings as the Judge may see fit having regard to the decision of *such questions of fact as may be necessary to be settled to assist the Federal Court in deciding the question which has arisen and to the speedy and economical final determination of the proceedings*.
>
> E (3) Where an order for stay of proceedings has been made under this section the Judge shall state the question which in his opinion has arisen as to the effect of the Constitution in the form of a special case which so far as may be possible shall state the said question in a form which shall permit of an answer being given in the affirmative or the negative.
>
> F (4) Where a Judge shall have stated a special case under this section the same shall be transmitted to the Federal Court in accordance with the rules of court of the Federal Court. (Emphasis added.)

G **[248]** The wording of the section indicates the following basic requirements for a referral to be made under s 84:

(a) the question to be referred must arise in any proceedings in any High Court;

H (b) the question relates to the effect of any provision of the Constitution; and

(c) the High Court judge should settle any questions of fact as may be necessary to assist the Federal Court in deciding the question, and to the speedy and economical final determination of the proceedings.

I **[249]** The separation of the question of law to be referred from questions of fact in s 84(2) appears to envisage some factual basis underlying the constitutional question to be referred. The section indicates that 'the Federal Court does not assume jurisdiction of the whole case but only of the

constitutional issue, remitting the case to the court of original jurisdiction for disposition in accordance with the constitutional determination' (HE Groves, *The Constitution of Malaysia* (Singapore: Malaysia Publications Ltd, 1964) at p 104).

[250] Once a special case is referred to the Federal Court, s 85 of the CJA becomes relevant:

> 85 Proceedings in Federal Court
>
> (1) Where a pecial case has been transmitted to the Federal Court under section 84, the Federal Court shall, subject to any rules of court of the Federal Court, *deal with the case and hear and determine it in the same way as an appeal to the Federal Court.* (Emphasis added.)

[251] The key words are 'in the same way as an appeal to the Federal Court'. Section 85(1) expressly allows the Federal Court to access the full spectrum of its powers as an appellate court in dealing with a case referred to it under s 84. The phrasing in s 85(1) can be contrasted with the more direct language in art 130 of the FC, which indicates that the Federal Court has no option but to pronounce an opinion on any question referred to it by the Yang di-Pertuan Agong:

> The Yang di-Pertuan Agong may refer to the Federal Court for its opinion any question as to the effect of any provision of this Constitution which has arisen or appears to him likely to arise, *and the Federal Court shall pronounce in open court its opinion on any question so referred to it*. (Emphasis added.)

[252] The powers available to the Federal Court in dealing with a civil appeal include, but are not limited to, the power to:

(a) amend or add questions of law for which leave to appeal has been granted (*Terengganu Forest Products Sdn Bhd v Cosco Container Lines Co Ltd & Anor and other applications* [2011] 1 MLJ 25 at para [32]);

(b) decline to answer a question of law if it relates to an issue which was not pleaded (*Lee Ah Chor v Southern Bank Bhd* [1991] 1 MLJ 428 at p 432);

(c) decline to answer a question of law if it relates to an issue which was abandoned before the High Court (*Dataran Rentas Sdn Bhd v BMC Construction Sdn Bhd* [2010] 5 MLJ 222 at para [9]);

(d) decline to answer a question of law if it is unnecessary or serves no purpose (*Blue Valley Plantation Bhd v Periasamy a/l Kuppannan & Ors* [2011] 5 MLJ 521 at para [24]); and

(e) decline to answer a question of law if it is abstract, academic, or hypothetical (*Terengganu Forest* para at [34]).

[253] It is clear that in dealing with a reference under s 84 CJA, the Federal Court is not bound to answer the constitutional question posed in the terms framed. This has been held in *Mark Koding v Public Prosecutor* [1982] 2 MLJ 120 at p 123, in which one of the questions referred to the Federal Court was whether Parliament has power to amend the constitution so as to alter its basic structure. Suffian LP found it unnecessary to answer the question for the purposes of deciding that case.

[254] Thus, the suggestion that the Federal Court has no choice but to answer any constitutional question referred to it in every case under s 84 of the CJA is misguided, and founded on a misunderstanding of the role and powers of the Federal Court.

Summary

[255] To summarise, the following principles should be borne in mind when considering the referral jurisdiction of the Federal Court:

(a) the referral jurisdiction in art 128(2) of the FC and s 84 of the CJA forms part of the constitutional framework, and must be construed in its light;

(b) the Federal Court is the court of last resort in respect of constitutional issues, except those falling within its narrowly construed original jurisdiction;

(c) s 84 does not fundamentally change the nature of the Federal Court into a constitutional court. It is not a carte blanche for all constitutional questions to be referred to and determined by the Federal Court in every case. The High Court should normally determine constitutional questions themselves at first instance; and

(d) where a special case is referred to the Federal Court under s 84, the Federal Court is not obliged to answer it in the terms posed, but retains a wide range of powers to deal with it in the same way as an appeal.

CONCRETE REVIEW

General rule against answering abstract, academic, or hypothetical questions

[256] The second point flowing from the common law model of constitutional adjudication is that constitutional questions are not determined in the abstract but by reference to the factual disputes from which they arise. This feature is reflected in the well-established principle that the court should decline to determine academic, abstract, or hypothetical questions. This principle is in no way abrogated by s 84 of the CJA.

[257] As a general rule, the court does not pronounce on abstract questions of law when there is no dispute to be resolved (*Sun Life Assurance Company of Canada v Jervis* [1944] AC 111 at pp 113–114; *Ainsbury v Millington* [1987] 1 All ER 929 at pp 930–931). It is not the function of the courts to decide hypothetical questions which do not impact on the parties before them; they are 'neither a debating club nor an advisory bureau' (*Bar Council Malaysia v Tun Dato' Seri Arifin bin Zakaria & Ors (Persatuan Peguam-peguam Muslim Malaysia, pencelah) and another case* [2018] MLJU 1288; [2018] 10 CLJ 129 at para [63]).

[258] The rationale from this rule stems from the function of common law courts to adjudicate upon actual disputes between parties: '[w]ithout a lis, the courts may find themselves being called on to give advisory opinions on abstract, hypothetical and/or academic questions instead of deciding on real disputes' *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476; [2012] SGCA 45 at [132]). As explained by the Hong Kong Court of Appeal in *Leung TC William Roy v Secretary for Justice* [2006] HKCU 1585 (at [28]):

> One of the recognized dangers of dealing with hypothetical or academic cases is that the court may be asked to decide important principles without the benefit of a full set of facts. There is also to be considered a practical factor: the administration of justice would hardly be served if the courts were regularly to entertain cases which were not real but only hypothetical.

[259] The need for the existence of a concrete dispute is also to ensure finality in the court's judgments; if there is in fact no real subsisting controversy, an issue decided in the abstract would not be *res judicata* and could be reopened again and again (*Tan Eng Hong* at para [132]).

[260] The general rule is equally applicable to questions of constitutional law. In matters of constitutional interpretation, the court must be mindful to confine their decisions to concrete questions which have actually arisen in the case, so as to avoid injustice to future cases (*Gin Poh Holdings Sdn Bhd* at [57]). The approach of the courts is succinctly stated by Justice Matthews in *Liverpool, New York & Philadelphia SS Co v Commissioners of Emigration* (1885) 113 US 33 at p 39:

> In the exercise of its jurisdiction … the Court is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. These rules are safe guides to sound judgment. It is the dictate of wisdom to follow them closely and carefully.

[261] The general rule is subject to an important proviso: the court still retains a discretion to hear a matter which has become academic in exceptional cases.

A The discretion may be exercised in respect of important questions of public law, where the case does not involve a detailed consideration of the facts, or where a large number of similar cases need to be resolved. This discretion, even in the area of public law, should not be exercised unless there is a good reason in the public interest for doing so (*R v Secretary of State for the Home* B *Department, ex p Salem* [1999] AC 450 at p 456; approved in *Bar Council Malaysia v Tun Dato' Seri Arifin bin Zakaria & Ors (Persatuan Peguam-peguam Muslim Malaysia, pencelah) and another case* at paras [59]–[60]).

C **[262]** It is observed that in the limited cases where the court exercised its discretion to invoke this exception, the cases generally involved questions that *became* academic due to a subsequent change in circumstances after the case was filed (*Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors v Arasa Kumaran* [2006] 6 MLJ 689 at para [6]; *Teoh Eng Huat v Kadhi, Pasir Mas &* D *Anor* [1990] 2 MLJ 300 at 301).

Test for determining whether matter is abstract or academic

[263] The test to determine whether a matter is abstract or academic is E 'whether there is in existence a matter in actual controversy between the parties which will affect them in some way' (*Metramac Corp Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd* [2006] 4 MLJ 113 at pp 120–121).

F **[264]** A live, practical question subsequently becomes academic, when the factual context has changed irrevocably such that the outcome will no longer affect the parties in any way. In such instances, the court will ordinarily decline to determine it. By way of illustration, in *Bar Council Malaysia v Tun Dato' Seri Arifin bin Zakaria & Ors (Persatuan Peguam-peguam Muslim Malaysia,* G *pencelah) and another case* [2018] MLJU 1288; [2018] 10 CLJ 129 (at paras [64]–[66]), the Federal Court held that the challenge to the constitutionality of the appointments of the Chief Justice and the President of the Court of Appeal became academic. Since the fundamental purpose of the application was to ensure that the two judges were removed from those H positions, once they have resigned, 'matters have changed irrevocably' and the factual substratum underlying the question no longer exists.

[265] In contrast, a matter is *not* abstract, academic or hypothetical if the parties' rights and interests are actually affected. In *Nik Noorhafizi bin Nik* I *Ibrahim & Ors v Public Prosecutor* [2013] 6 MLJ 660 (at paras [50], [65]), the appellants challenged the constitutionality of s 27 of the Police Act 1967, which was subsequently repealed. The Court of Appeal (sitting as the apex court) held that the constitutional challenge did not become academic. The appellants, who have been convicted and fined under that section, had a direct

interest to challenge their conviction and sentence.

[266] The key question is thus whether there is a real and actual controversy between the parties which will affect their rights and interests. Conceptually, the question is inextricably intertwined the test of locus standi, which requires a party to have been 'adversely affected' in the sense that they have a 'real and genuine interest in the subject matter' (*Malaysian Trade Union Congress & Ors v Menteri Tenaga, Air dan Komunikasi & Anor* [2014] 3 MLJ 145 at para [58]). A violation of a constitutional right gives rise both to a 'real interest' for a party to bring the action and a 'real controversy' between the parties to the action (*Tan Eng Hong* at para [106]). As such, in the context of determining whether there is a real controversy in a constitutional challenge, attempts to sever the requirement of an actual controversy from the notion of standing would be 'conceptually awkward, if not impossible' (*Croome v State of Tasmania* [1997] HCA 5; (1997) 142 ALR 397 at pp 405–406). For the purposes of this case, we will frame the foregoing discussion in terms of the *Metramac* test of 'actual controversy'.

Whether the mere existence of a law gives rise to an actual controversy affecting the parties

[267] In this case, the plaintiff does not assert that the NSCA has been invoked so as to violate his rights or interests, or that of anyone else. His grievance is purely legal, directed against the alleged inherent unconstitutionality of the Act. The constitutional questions referred to us arises from no other fact than the very existence of the Act itself. In these peculiar circumstances, the central issue is whether the questions referred are purely abstract or academic. Can the mere existence of a law, without more, give rise to an actual controversy affecting the parties? Or must the impugned law be used to the detriment of a party before it can constitute an actual controversy?

[268] Useful illumination on this question can be gleaned from three cases in different jurisdictions, all relating to similar subject matters: *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476; [2012] SGCA 45 (Singapore Court of Appeal), *Croome v State of Tasmania* [1997] HCA 5; (1997) 142 ALR 397 (High Court of Australia), and *Leung TC William Roy v Secretary for Justice* [2006] HKCU 1585 (Hong Kong Court of Appeal). In each case, the appellants, homoseuxal men, challenged the constitutionality of a particular provision in the local criminal legislation which criminalised consensual sexual conduct between males. In all three cases, the apex courts held that the appellants were entitled to bring the constitutional challenge; they need not wait to be prosecuted under the impugned provisions for a real controversy to arise.

[269] In *Tan Eng Hong*, the appellant was arrested and charged under s 377A of the Singapore Penal Code for the commission of an act of gross indecency with another male person. The appellant applied for a declaration that the section is unconstitutional. The charge was later substituted with a charge under a different section. The appellant pleaded guilty to the substituted charge and was accordingly convicted and sentence. The attorney general applied to strike out the constitutional challenge.

[270] The Singapore Court of Appeal held that the crux of the standing requirement as well as the requirement for a real controversy is the violation of a constitutional right; an arguable violation of constitutional rights gives rise to a real controversy for the court to determine (at paras [84], [179]). 'Every citizen has constitutional rights, not every citizen's constitutional rights will be affected by an unconstitutional law in the same way'; pertinently, while a constitutional right may be enjoyed by all citizens, the mere holding of a constitutional right is insufficient to found a challenge to the law — there must also be a violation of the constitutional right (at para [93]). It was found that an arguable violation of constitutional rights occurred when the appellant was arrested and detained under an allegedly unconstitutional law, even though the charge was subsequently substituted (at para [151]).

[271] However, the court went further and opined that the mere existence of an allegedly unconstitutional law can, in some cases, constitute a violation of constitutional rights. VK Rajah JA rejected the proposition that a prosecution under an allegedly unconstitutional law must be demonstrated in every case before a violation of constitutional rights can be shown (at para [110]):

> The effects of a law can be felt without a prosecution, and to insist that an applicant needs to face a prosecution under the law in question before he can challenge its constitutionality could have the perverse effect of encouraging criminal behaviour to test constitutional issues. Even though a violation of constitutional rights may be most clearly shown where there is a subsisting prosecution under an allegedly unconstitutional law, we find that a violation may also be established in the absence of a subsisting prosecution. In certain cases, the very existence of an allegedly unconstitutional law in the statute books may suffice to show a violation of an applicant's constitutional rights.

[272] While the court recognised the possibility of such a case in principle, it declined to lay down a general rule that the existence of an allegedly unconstitutional law constitutes a violation of the applicant's constitutional rights in every case (at para [109]). Whether the very existence of an unconstitutional law in the statute books suffices to show a violation of constitutional rights depends on what exactly that law provides (at para [94]). The court took pains to emphasise that such a case, though 'conceivable',

would be 'rare' and 'extraordinary', and cautioned that 'no such case has ever been brought to the attention of the courts here' (at [94], [106]).

[273] The court considered certain factors pointing towards a violation of constitutional rights by the mere existence of a law. One of the factors is whether the law specifically targets a particular group: a violation of constitutional rights 'may be more easily demonstrated where the law specifically targets a group and the applicant is a member of that group' (at para [94]). It was observed, without going into the merits of the challenge, that the impugned section affects the lives of a portion of the community in a very real and intimate way (at para [184]).

[274] Another relevant factor is a real and credible threat of prosecution under such a law (at para [179]):

> Although the existence of a lis is clearer when a prosecution has been brought under an allegedly unconstitutional law, the very fact of a real and credible threat of prosecution under such a law is sufficient to amount to an arguable violation of constitutional rights, and this violation gives rise to a real controversy for the court to determine.

[275] The threat of prosecution must be real and credible and not merely fanciful (at [111]–[114]). The reason why such a threat may be seen as giving rise to an actual controversy is 'that individuals should not be compelled to act against what is, on the face of it, the law, and thereby risk the actualisation of the threat of prosecution' (at para [178]). In that case, the court found that the threat of prosecution under the impugned section was not merely fanciful, given that the appellant professes to regularly participate in the kind of conduct criminalised (at para [183]).

[276] In the other two cases, no prosecution had been brought against the appellants pursuant to the impugned provisions. Nevertheless, the courts similarly held that the appellant need not wait to be prosecuted in order for an actual controversy to arise before a challenge can be mounted. In *Croome*, Gaudron, McHugh and Gummow JJ in the High Court of Australia rejected the contentions that the appellants' claim for a declaration of unconstitutionality was premature and that there was no immediate right or liability to be determined, because the state had not yet invoked legal proceedings to enforce the criminal law against the appellants (at pp 409, 411). The appellants' conduct of their personal lives were found to have been overshadowed by the presence of the impugned provisions in significant respects. Moreover, since the state has not disabled itself from prosecuting in the future, it was found that the appellants had a real interest and did not raise a question which is abstract or hypothetical (at p 411).

[277] Crucially, the principle that an appellant who has not been prosecuted by an impugned law may challenge its validity is not without limit. Brennan CJ, Dawson and Toohey JJ stressed that they did not assent to the 'broad proposition' that any person who intends to act in contravention of a law can seek a declaration that the law is invalid, purely by reason of that intention (at p 402).

[278] The same conclusion was reached by the Hong Kong Court of Appeal in *Leung*. In that case, an argument was raised that the constitutional challenge was based on the 'purely hypothetical situation' that the appellant may be prosecuted in the future (at para [26]). The court nevertheless held that in view of 'exceptional circumstances', there was sufficient justification to entertain the challenge (at para [30]). Notwithstanding the fact that 'a prosecution is neither in existence nor in contemplation', Ma CJHC found it clear that the appellant 'and many others like him have been seriously affected by the existence of the legislation under challenge' (at para [29]):

> It is fair to say that the respondent has been living under a considerable cloud. The effect of the respondent's submissions is really that the constitutionality of the affected provisions can only be tested if the Applicant were to go ahead with those activities criminalized by the provisions in question and be prosecuted for them. In other words, access to justice in this case could only be gained by the Applicant breaking what is according to the statutory provisions in question, the law.

[279] Again, the requirement of 'exceptional circumstances' was emphasised. Such situations cannot be enumerated exhaustively but must be determined on a case by case basis (at para [28]). Examples include 'situations where it would be undesirable or prejudicial to force interested parties to adopt a wait and see attitude (that is, to force persons to wait until an event occurs) before dealing with a matter' (at para [28]).

[280] These principles are not foreign to the Malaysian courts. The proposition that a real threat to a party's rights can give rise to an actual controversy that is not abstract or academic was recognised by the Federal Court in *Datuk Syed Kechik bin Syed Mohamed v Government of Malaysia & Anor* [1979] 2 MLJ 101. In that case, in response to an apparent threat to expel him from the state, the appellant sought declarations that he had the right to remain in Sabah. The Federal Court held that the action demonstrated a real dispute and was not academic. Suffian LP held that (at p 108):

> As the distinguished American scholar, EM Borchard on 'Declaratory Judgments', 2nd Ed, p 20, referring to those cases where no traditional wrong has yet been committed or immediately threatened, says *'a condition of affairs is disclosed which indicates the existence of a cloud upon the plaintiff's rights, a cloud which endangers his peace of mind, his freedom and his pecuniary interests* ...' ... The fact that the declaration was sought before the statutory powers were exercised was not a

consideration weighing against the grant of that declaration... we consider that a court should make it possible to settle *real disputes* immediately they arose, so that the parties may act with certainty and not be under the threat of legal uncertainty and should be able to discount the future. (Emphasis added.)

[281] We consider the situation envisaged — where a constitutional challenge can be brought on the basis of the mere existence of a law — is not technically an exception to the general rule against determining abstract or academic questions without an actual controversy. Rather, such a situation is an exceptional case where, due to certain factors, the existence of the law itself affects the rights of parties and gives rise to an actual controversy.

[282] We find much merit in the reasoning of the cases above. In our model of concrete review, courts would not ordinarily treat the mere existence of a law as an actual controversy suitable for determination. However, in the face of an exceptional law specifically targeted against a minority group, the very existence of which amounts to a real and credible threat to their rights — Holocaust-type laws would be an extreme example — the courts are not obliged to stand idly by until the threat materialised. In the words of Lord Woolf (*Droit Public — English Style*, (1995) Public Law 57 at p 68), 'If Parliament did the unthinkable, then I would say that the courts would also be required to act in a manner which was without precedent'.

Summary

[283] The following principles can be distilled from the discussion above:

(a) the general rule is that the court should not answer questions which are abstract, academic, or hypothetical. This flows from the common law model, under which the role of the court is to adjudicate matters in the context of the facts of the particular dispute before it;

(b) the test for whether a matter is abstract or academic is whether there is an actual controversy affecting the rights and interests of the parties. A violation of constitutional rights can give rise to an actual controversy to be determined by the court;

(c) in principle, the very existence of a law can potentially constitute a violation of constitutional rights so as to give rise to an actual controversy in exceptional cases. A party need not wait for an unconstitutional law to be invoked to his detriment in every case in order to challenge its validity; and

(d) however, such cases are rare and exceptional. Without purporting to lay down any exclusive or exhaustive test, we observe that where the law is specifically targeted against a particular group, or there is a real and

credible threat of the law being used against a party, these factors point toward the existence of an actual controversy affecting the rights of the party.

OUR DECISION

[284] With reference to the basic requirements in s 84 of the CJA, we note that the questions arose in proceedings commenced by way of Originating Summons in the High Court. The questions concern the effect of constitutional provisions. It is not apparent that there were any questions of fact which were necessary to be determined by the High Court before referring the case to this court. On the face of it, the basic statutory requirements of s 84 appear to be satisfied. The central issue in this case is *how* the Federal Court should deal with the special case before us.

[285] In the originating summons and the affidavit in support, the only facts stated by the plaintiff are that he was imprisoned at the time of the action and that he brought the action as a citizen of Malaysia. The remaining contents of the affidavit were purely legal in nature, relating to the amendment to art 66(4) of the FC, the enactment of the NSCA, and the alleged inconsistency with the provisions and basic structure of the FC. The plaintiff did not assert that his rights have been affected by the amending provisions or the NSCA. Indeed, no mention was made as to what rights, if any, of the plaintiff or any other person have been affected or are threatened to be affected by the amending provisions or the NSCA.

[286] Whilst we recognise that in principle, the very existence of an allegedly unconstitutional law may in some cases give rise to an actual controversy affecting the rights of the parties, it has not been demonstrated to our satisfaction that the present case falls within that exceptional category. It was not alleged, for instance, that the NSCA is a law specifically targeted at a particular group of which the plaintiff is a part, nor was it alleged that the plaintiff faces a real and credible threat of action under the NSCA which would be detrimental to his rights. It has not been shown that the very existence of the NSCA in the statute books interferes with the conduct of the plaintiff's personal life or that of any other person, unlike in the cases of *Tan Eng Hong*, *Leung*, and *Croome* above. The mere assertion that the statute exists and that the plaintiff is a citizen, without more, is insufficient to give rise to an actual controversy.

[287] In the absence of an actual controversy affecting the rights of parties, the constitutional questions referred to us are abstract and purely academic. The questions have not *become* academic due to some change in the factual substratum; they were academic for there was no real dispute underlying them

to begin with. They exist in a complete factual vacuum in the case before us. To answer the questions posed would be a significant departure from the deep-rooted and trite rule that the court does not entertain abstract or academic questions, and may even represent a fundamental shift away from the common law model of concrete review towards the European model of abstract review in constitutional adjudication. Exceptionally cogent reasons would need to be provided to persuade the Federal Court to undertake such a radical departure from established principle. In this case, the parties have not attempted to do so.

[288] Although the constitutional questions posed are undoubtedly of importance, based on the cause papers before us, we regretfully consider that this is not a proper case for the Federal Court to answer the questions in the abstract. In the circumstances, we are constrained to go no further than to express our grave reservations as to the constitutional validity of the NSCA.

[289] We note that several guidelines in respect of references to the Federal Court under s 84 CJA were formulated by the Court of Appeal in *Wee Choo Keong v Lee Chong Meng & Anor* [1996] 3 MLJ 41. Our decision does not turn on those guidelines. In view of the abstract nature of the questions and the absence of an actual controversy, it is not necessary to examine the scope and correctness of those guidelines for the purposes of this case.

CONCLUSION

[290] Based on the foregoing, under the powers available to the Federal Court in s 84 of the CJA, we would decline to answer the constitutional questions posed. In view of the particular circumstances of this case, we therefore remit the case to the High Court.

Order accordingly.

Reported by Ashok Kumar